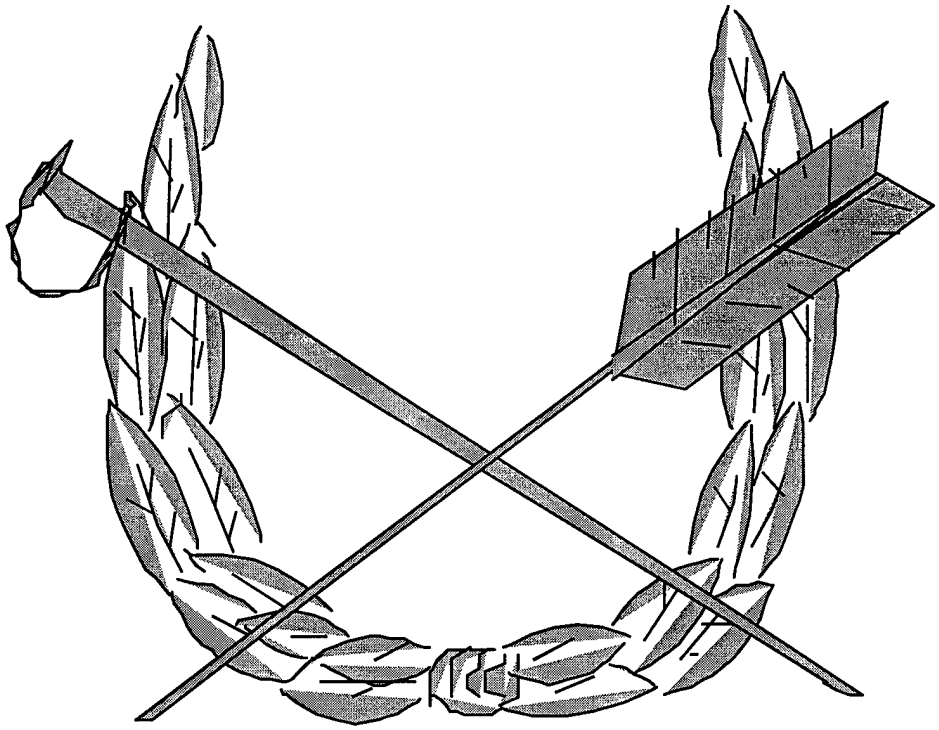
GOVERNMENT INFORMATION PRACTICES



Administrative and Civil Law Department
The Judge Advocate General's School
United States Army
Charlottesville, Virginia
22903-1781

JA 235 MARCH 2000

REPORT DOCUMENTATION PAGE

1. AGENCY USE ONLY *(Leave blank)*	2. REPORT DATE 11 May 2000	3. REPORT

4. TITLE AND SUBTITLE
Government Information Practices, JA 235, March 2000, 181 pages

6. AUTHOR(S)
TJGASA, Ad & Civ Law, Leg Asst Br
600 Massie Road
Charlottesville, VA 22903

7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES)
TJAGSA
600 Massie Road
Charlottesville, VA 22903

9. SPONSORING / MONITORING AGENCY NAME(S) AND ADDRESS(ES)
Same as 7.

11. SUPPLEMENTARY NOTES
Revised

12a. DISTRIBUTION / AVAILABILITY STATEMENT
A

Plagiarism is the presentation of distinctive words or ideas of another as one's own without crediting the source. Plagiarism may be avoided by citing the source from which the material was taken. This applies to the publication and other material prepared by instructors at The Judge Advocate General's School, U.S. Army.

DEPARTMENT OF THE ARMY

THE JUDGE ADVOCATE GENERAL'S SCHOOL
CHARLOTTESVILLE, VIRGINIA 22903-1781

PREFACE

This compilation of cases and materials is designed to provide students with primary source material concerning government information practices.

The right of the American public to be informed about the operation of its government has been established. Through the Freedom of Information Act, Congress has sought to ensure that this right is preserved. Of equal importance to American citizens is their right of privacy. Only in recent years has it become evident that this right is subject to infringement by the record-keeping practices of government. The Privacy Act of 1974 is the first comprehensive legislative scheme designed to assure individuals that their privacy will not be improperly eroded by such practices.

The first part of this casebook is devoted to a study of public access to agency records under the Freedom of Information Act and the need to protect legitimate commercial and governmental interests. The second part of the book focuses on the individual's right of privacy as affected by the federal government's collection, use, and dissemination of information. It includes material related to the key provisions of the Privacy Act and the "privacy exemption" of the Freedom of Information Act.

This casebook does not purport to promulgate Department of the Army policy or to be in any sense directory. The organization and development of legal materials are the work product of the members of The Judge Advocate General's School faculty and do not necessarily reflect the views of The Judge Advocate General or any governmental agency. The words "he," "him," and "his" when used in this publication represent both the masculine and feminine gender unless otherwise specifically stated.

GOVERNMENT INFORMATION PRACTICES
(JA 235)

TABLE OF CONTENTS

CHAPTER 4. GOVERNMENT DISCLOSURE OF PERSONAL INFORMATION

PART A: THE PUBLIC'S RIGHT TO KNOW

CHAPTER 1

THE CONCEPT OF OPEN GOVERNMENT

1.1 Introduction.

The public information section of the Administrative Procedure Act was somewhat vague and contained language that resulted in the withholding, rather than disclosure, of many documents. It was amended in 1966 by what is now known as the Freedom of Information Act (codified at 5 U.S.C. § 552). A foreword to the Attorney General's memorandum concerning the Act explains its purpose.

> Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967) [hereinafter cited as Attorney General's 1967 Memorandum]
>
> FOREWORD
>
> If government is to be truly of, by, and for the people, the people must know in detail the activities of government. Nothing so diminishes democracy as secrecy. Self-government, the maximum participation of the citizenry in affairs of state, is meaningful only with an informed public. How can we govern ourselves if we know not how we govern? Never was it more important than in our times of mass society, when government affects each individual in so many ways, that the right of the people to know the actions of their government be secure.
>
> Beginning July 4, a most appropriate day, every executive agency, by direction of the Congress, shall meet in spirit as well as practice the obligations of the Public Information Act of 1966. President Johnson has instructed every official of the executive branch to cooperate fully in achieving the public's right to know.
>
> Public Law 89-487 is the product of prolonged deliberation. It reflects the balancing of competing principles within our democratic order. It is not a mere recodification of existing practices in records management and in providing individual access to Government documents. Nor is it a mere statement of objectives or an expression of intent.
>
> Rather this statute imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It leaves no doubt that disclosure is a transcendent goal, yielding only to such compelling considerations as those provided for in the exemptions of the act.

This memorandum is intended to assist every agency to fulfill this obligation, and to develop common and constructive methods of implementation.

No review of an area as diverse and intricate as this one can anticipate all possible points of strain or difficulty. This is particularly true when vital and deeply held commitments in our democratic system, such as privacy and the right to know, inevitably impinge one against another. Law is not wholly self-explanatory or self-executing. Its efficacy is heavily dependent on the sound judgment and faithful execution of those who direct and administer our agencies of Government.

It is the President's conviction, shared by those who participated in its formulation and passage, that this act is not an unreasonable encumbrance. If intelligent and purposeful action is taken, it can serve the highest ideals of a free society as well as the goals of a well-administered government.

This law was initiated by Congress and signed by the President with several key concerns:

--that disclosure be the general rule, not the exception;

--that all individuals have equal rights of access;

--that the burden be on the Government to justify the withholding of a document, not on the person who requests it;

--that individuals improperly denied access to documents have a right to seek injunctive relief in the courts;

--that there be a change in Government policy and attitude.

It is important therefore that each agency of Government use this opportunity for critical self-analysis and close review. Indeed this law can have positive and beneficial influence on administration itself---in better records management; in seeking the adoption of better methods of search, retrieval, and copying; and in making sure that documentary classification is not stretched beyond the limits of demonstrable need.

At the same time, this law gives assurance to the individual citizen that his private rights will not be violated. The individual deals with the Government in a number of protected relationships which could be destroyed if the right to know were not modulated by principles of confidentiality and privacy. Such materials as tax reports, medical and personnel files, and trade secrets must remain outside the zone of accessibility.

This memorandum represents a conscientious effort to correlate the text of the act with its relevant legislative history. Some of the statutory provisions allow room for more than one interpretation, and definitive answers may have to await court rulings. However, the Department of Justice believes this memorandum provides a sound working basis for all agencies and is thoroughly consonant with the intent of Congress. Each agency, of course, must determine for itself the applicability of the general principles expressed in this memorandum to the particular records in its custody.

This law can demonstrate anew the ability of our branches of Government, working together, to vitalize the basic principles of our democracy. It is a balanced approach to one of those principles. As the President stressed in signing the law:

"* * * a democracy works best when the people have all the information that the security of the Nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest * * *. I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded."

This memorandum is offered in the hope that it will assist the agencies in developing a uniform and constructive implementation of Public Law 89-487 in line with its spirit and purpose and the President's instructions.

RAMSEY CLARK,
Attorney General,
June 1967

In 1974 Congress amended the Freedom of Information Act substantively by narrowing the scope of the Act's exemptions, and procedurally by requiring more expeditious agency responses to requests for records by members of the public. A further substantive change was made in 1976 narrowing the reach of exemption 3. A minor change to the Act's provision for disciplinary proceedings was made in 1978. In 1986 Congress further amended the Act by substantially revising the fee charging and waiver provisions and broadening the protection for law enforcement information. In 1996, the Act was amended to address electronic record and other procedural issues.

1.2 Publication of Information in the Federal Register.

a. The Freedom of Information Act divides government information into three major categories: (1) that which must be published in the Federal Register, (2) that which must be made available for public inspection and copying, and (3) records which do not fall into the first two categories but must be furnished to members of the public upon request. The first category is set forth in subsection (a)(1) of the Act. Its provisions are repeated, almost verbatim, in Army Regulation No. 310-4:

Army Regulation 310-4
(22 July 1977)

2-2. Information to be published. In deciding which information to publish, consideration will be given to the fundamental objective of informing all interested persons of how to deal effectively with the Department of the Army. Information to be currently published will include--

a. Descriptions of the Army's central and field organization and the established places at which, the officers from whom, and the methods whereby the public may obtain information, make submittals or requests, or obtain decisions;

b. The procedures by which the Army conducts its business with the public, both formally and informally;

c. Rules of procedures, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

d. Substantive rules of applicability to the public adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the Army; and

e. Each amendment, revision, or repeal of the foregoing.

. . . .

---

b. Army Regulation 310-4 defines a "rule" as "the whole or part of any Department of the Army statement . . . of general or particular applicability and future effect, which is designed to implement, interpret, or prescribe law or policy or which describes the organization, procedure, or practice of the Army." The regulation prohibits the issuance of a "rule" "unless there is on file with The Adjutant General . . . a statement to the effect that it has been evaluated in terms of this regulation." Major commands are given responsibility for ensuring compliance with the regulation by their subordinate installations, activities, and units. While the "notice and comment" rulemaking provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1988), do not apply to military or foreign affairs functions, the Army has, in effect, adopted such provisions for certain types of proposed rules which are required to be published in the Federal Register.

Army Regulation No. 310-4
(22 July 1977)

3-2. Applicability.

a. These provisions apply only to those Department of the Army rules or portions thereof which--

(1) Are promulgated after the effective date of this regulation; and
(2) Must be published in the FEDERAL REGISTER in accordance with chapter 2 of this regulation; and
(3) Have a substantial and direct impact on the public or any significant portion of the public; and
(4) Do not merely implement a rule already adopted by a higher element within the Department of the Army or by the Department of Defense.

b. Subject to the policy in paragraph a above, and unless otherwise required by law, the requirement to invite advance public comment on proposed rules does not apply to those rules or portions thereof which--

(1) Do not come within the purview of paragraph a above; or
(2) Involve any matter pertaining to a military or foreign affairs function of the United States which has been determined under the criteria of an Executive Order or statute to require a security classification in the interests of national defense or foreign policy; or
(3) Involve any matter relating to Department of the Army management, personnel, or public contracts; e.g., Armed Services Procurement Regulation, including nonappropriated fund contracts; or
(4) Constitute interpretative rules, general statements of policy, or rules of organization, procedure, or practice; or
(5) The proponent of the rule determines for good cause that inviting public comment would be impracticable, unnecessary, or contrary to the public interest. This provision will not be utilized as a convenience to avoid the delays inherent in obtaining and evaluating prior public comment. (See also para. 3-7.)

. . . .

Note. An example of an Army regulation required to be published in the Federal Register is AR 25-55, The Department of the Army Freedom of Information Act Program, which in part explains how to request information from the Army under the Freedom of Information Act. What is the practical effect of these provisions at the installation level? Can you think of an example of an installation regulation to which any of the provisions of AR 310-4 would apply? What kind of Army regulations are affected? See United States v. Mowat, 582 F.2d 1194 (9th Cir. 1978); Pruner v. Dep't of Army, 755 F. Supp. 362 (D. Kan. 1991). For a helpful article which is still correct in this slowly developing area of the law, see Schempf and Eisenberg, Publish or Perish: An Analysis of the Publication Requirement of the Freedom of Information Act, The Army Lawyer, August 1980, at 1-11.

1.3 The Indexing and Public Inspection and Copying Requirement.

a. The second major subsection of the Freedom of Information Act requires that certain kinds of information be indexed and made available for public inspection and copying. These so-called "(a)(2)" or "reading room" materials fall into four subcategories. The first subcategory consists of "final opinions, including concurring and dissenting opinions, as well as orders made in the adjudication of cases." Litigation concerning this obligation has had an impact on the armed services. The settlement of a case involving discharge review procedures has resulted in a requirement that decisions of all Discharge Review Boards and Boards for the Correction of Military Records be indexed and made available to the public. Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, Civil No. 76-530 (D.D.C., stipulation of dismissal approved Jan. 31, 1977), discussed in Stickman, Developments in the Military Discharge Review Process, 4 Mil. L. Rep. 6001, 6009-11 (1976). Similarly, the case of Hodge v. Alexander, Civil No. 77-288 (D.D.C., order filed May 13, 1977), requires that the Army publish or make available for public inspection and copying, an index to all final dispositions of complaints under Article 138, UCMJ.

b. The second subcategory under (a)(2) includes "those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register." This provision has resulted in little litigation. Most Army regulations which need not be published in the Federal Register under the provisions of AR 310-4 fall into this category.

c. The third subcategory under (a)(2) consists of "administrative staff manuals and instructions to staff that affect a member of the public." A case which considers this provision helps explain the reasons for the existence of the public inspection and copying requirement.

Cuneo v. Schlesinger
484 F.2d 1086 (D.C. Cir. 1973)
[Most footnotes omitted.]

Before BAZELON, Chief Judge, and ROBINSON and WILKEY, Circuit Judges.

WILKEY, Circuit Judge:

Appellant sought to obtain disclosure under the Freedom of Information Act of the Defense Contract Audit Manual, a manual prepared by the Defense Contract Audit Agency in the Department of Defense. On cross-motions for summary judgment, and after an in camera inspection, the District Court held that the portions of the Manual not available to the public were exempt from disclosure under exemptions two and five of the FOIA. For lack of a detailed record essential to this type action, we are unable to determine if the information sought by appellant falls within one of the exemptions. We remand for further proceedings.

I. Facts

The Defense Contract Audit Agency was established to provide necessary audit services to government officers in contract administration. DCAA acts in an advisory capacity to the contracting officer, and verifies that the costs incurred in performing a contract for the Armed Services comply with criteria of the Armed Services Procurement Regulations by conducting an examination of government contractors' books and records. In view of the large number of government contractors and the great volume of contracts in different stages of performance, the DCAA must necessarily be selective and must limit its scrutiny to a relatively small portion of the books and records which could be audited. The Defense Contract Audit Agency Manual, first issued in its current form in 1965, was designed to guide DCAA auditors in effective auditing in a selective manner.

Appellant alleges that the Manual, or parts of it, have regularly been made available to members of the public, including on occasion appellant's clients. Appellees do not dispute this but, rather, allege that these disclosures were never authorized. In addition, a relatively complete description of the contents of the Manual, including quotations from it, has been published in a treatise on defense contract auditing. Finally, the Manual is made available to certain non-federal agencies and foreign governments who deal with American contractors. Thus, to at least some extent, the Manual has been made available to individuals outside the DCAA.

The Government argued before the trial court that the information in controversy was exempt because it was "(2) related solely to the internal personnel rules and practices of an agency"; constituted "(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency"; and/or was composed of "(7) investigatory files compiled for law enforcement purposes except to the

extent available by law to a party other than an agency." The trial court, after examining the Manual in camera, on motions for summary judgment held that it was a "playbook," or "game plan," i.e., tactics to be employed, and that this playbook was exempt from disclosure under categories (2) and (5).

On appeal appellant abandoned his efforts to obtain those portions of the Manual that constitute a mere playbook.[1] He redoubled his argument, however, that portions of the Manual dealt with the allowability of costs. Such portions, according to appellant, constitute a form of substantive "secret law" that must be disclosed under the FOIA. Appellant also argued that the disclosure of portions of the Manual to various individuals, other non-federal agencies and foreign governments, constituted a waiver of exemption as to those portions.

II. The Nature of the Information Sought

---

[1]There was considerable confusion regarding precisely what appellant wanted to have disclosed. After questioning by this court during oral argument it became obvious that appellant was not asking for the Manual to be disclosed in its entirety. The following dialogue indicates the parameters of appellant's request for disclosure:

THE COURT: Are there any instructions available to the field auditors which you would agree you do not have access to?

APPELLANT: Well, as we have suggested in our brief, if there are such things as saying the time of the audit, or it is not necessary to audit, say, fringe benefits, then of course, that might be excluded, but to the extent that any of the principles of ASPR--ASPR has the force and effect of law, in accordance with several decisions of the Supreme Court--to the extent that this Manual refines ASPR and its application, it becomes secret law, because it is ASPR that we are bound by.

* * *

THE COURT: How would you distinguish between what Judge Hart referred to as the "game plan" and the law?

APPELLANT: Well, to the extent that the Manual refines ASPR--which we believe it must because ASPR is very general and every agency has an audit manual refining the cost principles set forth in their regulations--that is law and that becomes secret law. To the extent that the Manual might say "conduct the audit at a certain hour during the day or pick out this account and not that account," we don't need that and I don't think the public is entitled to it. But, to the extent that there are refinements of cost principles, I think that is clearly secret law. That is not giving away the game plan; that is a refinement of regulations that have the force and effect of law.

* * *

THE COURT: If we find some things in there that don't fall within your definition of secret law, and are outside those areas that you contended relate to costs of contracts audited, then perhaps those things should remain secret?

APPELLANT: I agree, I agree.

Before the trial court appellant was requesting the entire contents of the Manual. According to the Government, the non-public portions of the Manual provide "uniform guidance and instructions concerning the criteria to be used in deciding what must be audited, how it shall be audited, what is to be the depth of the examination, what the frequency of the audit shall be, and how to determine the extent of reliance which may be placed on the contractor's own internal controls." In other words, the Manual is a mere "playbook" that tells auditors where to look in the mass of books and records confronting them, but does not provide substantive guidance or otherwise set standards for what costs will actually be allowed. If a contractor knows in advance the coverage, depth, and scope of an audit, the contractor may be able to claim improper costs in areas that will receive little or no scrutiny. Thus, the Government argues that, for an audit to be effective, the portion of the Manual on coverage, depth, and scope must be kept secret.

Appellant disputes as a matter of fact this characterization of the Manual's contents. As a matter of law appellant's primary theory originally was that the Manual was an "administrative staff manual. that affect[s] a member of the public." The FOIA specifically requires that such "administrative staff manuals" be made available to the public.

In addition to his principal contention that the entire Manual be disclosed as being an "administrative staff manual," appellant advanced two subsidiary arguments that, if accepted, would require the disclosure of portions of the Manual. First, appellant contended that at least portions of the Manual set forth standards of interpretation of ASPR and guidelines for the allowability of costs; these portions were said to constitute a form of "secret law" that must be disclosed under the FOIA. Secondly, appellant claimed that portions of the Manual had been made available to various persons and entities outside the Federal Government, and that at least as to these disclosed portions, DCAA had waived any right it might have to keep them secret.

At oral argument appellant abandoned his request for the entire Manual and narrowed his efforts to seeking disclosure of the portions that constituted "secret law." Due to this concession, we no longer have reason to consider whether the entire Manual must be disclosed under the requirement covering "administrative staff manuals." By like token, we need not consider the argument that disclosure to certain individuals and entities constituted a waiver of any right to keep those portions secret. This is true because appellant has stated that he wants only those portions of the Manual which constitute "secret law." Since appellant has an undeniable right to obtain such law, it is irrelevant whether those portions may also be obtained under a theory of waiver. We therefore do not decide any waiver issue here.

There does not appear to be any disagreement between the parties regarding what the nature of the "secret law" being sought actually is. The portions sought by appellant, which the Government agrees should be made available if they actually exist, are those which either create or determine the extent of the substantive rights and liabilities of a person affected by those portions. Information that falls within this definition would include, for example, guidelines for what costs would be allowed under ASPR, and rules or interpretations dealing with other substantive laws. Appellant does not seek to obtain disclosure of those portions of the Manual that prescribe techniques to uncover the facts relevant to a particular contract. Nor is a right to disclosure claimed for procedures directing auditors to concentrate examination on certain elements of a contractor's records.

It is clear that if any portion of the Manual does consist of interpretations of rules and statutes or guidelines for allowability of costs, appellant has a right to obtain disclosure. Indeed, this was conceded by government counsel during oral argument. The sole remaining issue is thus purely factual--whether the Manual does contain any "secret law".

In the unsatisfactory manner in which these FOIA cases have been arising, we have no record before us containing the answer to this issue. The District Judge was confronted with appellant's original claim for total access to the Manual, opposed by the Government's claim to blanket exemption under three exceptions to disclosure. On cross-motions for summary judgment, after in camera examination of the several volumes constituting the Manual, the District Judge sustained the Government's overall non-disclosure position under exemptions (2) and (5). Counsel apparently made no discriminating analysis of how portions of the Manual might differ in their purpose, nature, and content, and thus be subject to different criteria of disclosure; understandably, the trial judge made none.

III. Procedures Under the FOIA

A. Problems of Testing Disclosability of Allegedly Secret Information

Recently in Vaughn v. Rosen this court had occasion to discuss the problems inherent in implementing the FOIA. Despite the heavy emphasis in favor of disclosure and the specific requirement that the Government shall have the burden of proving that information need not be revealed, we noted in Vaughn that procedures most often used in FOIA cases permit the Government very easily to avoid disclosure. Since the party seeking disclosure does not know the contents of the information sought, he cannot argue as

effectively that the documents sought are, for example, "secret law" to which he is entitled access. In contrast, the Government does have access to the information and with confidence can convincingly argue to the trial judge that the factual nature of the information is as the Government alleges.

As we noted in Vaughn, the burden of actually determining whether the information is as the Government describes it falls ultimately on the court system. After the Government alleges that the documents in controversy do not contain material which must be disclosed, but on the other hand consist of information whose secrecy must be preserved, the very claim of secrecy, under the usual court procedures in vogue, means that the Government has substantially relieved itself of the burden of proving more. To preserve secrecy it is then up to the trial judge to wade through the mass of documents and determine whether the information must be disclosed. The party seeking disclosure is helpless to contradict the Government's description of the information or effectively to assist the trial judge.

In Vaughn we concluded that the ease with which the Government could carry its burden, and the difficulty that a trial judge faces in determining whether information should be disclosed, created intolerable problems. First, it encouraged agencies to argue for the widest possible exemption from disclosure for the greatest bulk of material. Secondly, it had a tendency to undermine the reliability of a trial judge's findings; a trial judge, without the aid of counsel seeking disclosure, cannot be expected to investigate and isolate the factual nature of individual documents in a mass of similar appearing material. Thirdly, because the points of factual dispute have not been isolated by the traditional forms of argumentation and adversary testing, a determination is virtually unreviewable on appeal. The case at bar we remand for additional proceedings which hopefully will rectify to some extent these flaws.

B. Procedures Upon Remand

1. As in Vaughn v. Rosen, we believe that the problems adverted to will be substantially ameliorated if the Government is required to provide particularized and specific justification for exempting information from disclosure. This justification must not consist of "conclusory and generalized allegations of exemptions, such as the trial court was treated to in this case, but will require a relatively detailed analysis in manageable segments." It is particularly important that information which is in effect substantive law not be concealed beneath a mass of other material. Even when the law is closely intermingled with other data, we cannot conceive of a situation in which legal interpretations and guidelines could not be segregated from other material and isolated in a form which could be disclosed.

2. Upon remand the Government should correlate its reasons for claiming that the various portions of the Manual should not be disclosed with the relevant portions of the Manual.

> [A]n indexing system would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification. Opposing counsel should consult with a view toward eliminating from consideration those portions that are not controverted and narrowing the scope of the court's inquiry. After the issues are focused, the District Judge may examine and rule on each element of the itemized list.

3. Finally, if the District Judge deems it appropriate, he may appoint a special master to examine the Manual, the Government's justification, and the indexing. This could, in some circumstances, relieve much of the burden of evaluating voluminous documents that currently falls on the trial judge.

IV. Conclusion

The case is remanded so that the Government may undertake to index and justify the Manual in a manner consistent with Part III of this opinion, and for the District Judge to rule thereon.

So ordered.

Note 1. Do any opinions of The Judge Advocate General fall within any of the provisions of "(a)(2)"? Yes, in those instances where The Judge Advocate General has authority to act for the Secretary, but not in those instances where The Judge Advocate General is issuing non-binding opinions. See Vietnam Veterans of America v. Department of Navy, 876 F.2d 164 (D.C. Cir. 1989).

Note 2. The idea that "secret law is an abomination" comes from Professor Davis' treatise on administrative law. Administrative Law Treatise § 3A.l2 (l970 Supp.) The treatise, as updated in the second edition, is one of the leading scholarly works on the Freedom of Information Act.

d. The fourth category of (a)(2) materials was added by the Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, and consists of copies of records released to the public as a result of an individual request which "the agency determines have become or are likely to become the subject of subsequent requests for

substantially the same records." Ideally, this availability will satisfy much of the future demand for those frequently requested records which have already been processed for release.

e. In addition to creating a new category of (a)(2) materials, the Electronic Freedom of Information Act Amendments of 1996 requires agencies to use electronic information technology to enhance the availability of their reading rooms. Specifically, they require agencies make all 9(a)(2) records created by the agency on or after November 1, 1996, to be available through on-line access by November 1, 1997. This means that all final opinions, statements of policy, administrative staff manuals, and copies of frequently requested FOIA disclosures which were created by the agency after November 1, 1996, will have to be available on the agency's World Wide Web site, in addition to being made available in paper format in the reading room.

1.4 The Release Upon Request Requirement.

The best known disclosure mandate in the FOIA requires that, upon request, an agency must make available any agency record to any person, unless the record is exempt under paragraph (b) of the Act. Denials of access to agency records under this disclosure mandate generate most of the litigation under the Freedom of Information Act.

Note 1. An important initial determination before releasing information under subparagraph (a)(3) of the FOIA is whether the information is contained in an "agency record." Physical possession by an agency of a record generated outside that agency does not, by itself, dictate "agency" status. To be an "agency record," the agency must not only possess the record but also exercise dominion and control over it. See Department of Justice v. Tax Analysts, 492 U.S. 136 (1989) and McGehee v. CIA, 697 F.2d 1095 (D.C. Cir. 1983). Additionally, the Supreme Court has held that agencies are not required by the Act to retrieve records formerly in their possession, Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980), nor must agencies exercise their legal power to obtain records from outside sources in order to satisfy a FOIA request. Forsham v. Harris, 445 U.S. 169 (1980).

Note 2. Is a commander's or supervisor's notebook containing personal notes an agency record for purposes of the Freedom of Information Act? It depends. Such notebooks certainly can become an agency record subject to FOIA. If a commander wants to maintain a personal notebook and keep it truly "personal," he or she should remember some simple guidelines: personal notes are merely an extension of one's memory; personal notes are created and destroyed at the sole discretion of the writer (whereas notes that one is either required to create or not free to destroy may be agency records); explicitly referring to one's personal notes in an official document (incorporation by reference) causes them to become agency records; similarly, commanders cannot pass personal notes to a successor commander; nor may personal notes be shown to any other agency personnel. For further discussion of the factors relevant to determining whether something is an agency record or a personal record,

see Bureau of National Affairs, Inc. v. United States Department of Justice, 742 F.2d 1484 (D.C. Cir. 1984); see also Kalmin v. Dep't of the Navy, 605 F. Supp. 1492 (D.D.C. 1985).

Note 3. Agencies are required under the FOIA to disclose "reasonably segregable" nonexempt portions of otherwise exempt records. 5 U.S.C. § 552(b). See Ogelsby v. Department of the Army, 79 F.3d 1172 (D.C. Cir. 1996). When does segregating exempt information from agency records become so burdensome that it becomes unreasonable? See Yeager v. DEA, 678 F.2d 315 (D.C. Cir. 1982); Lead Industries Ass'n v. OSHA, 610 F.2d 70 (2d Cir. 1979). A related obligation imposed by the Electronic Freedom of Information Act Amendments of 1996 requires agencies to make "reasonable estimates" of the volume of material denied to a requester and to indicate on any released record the amount of information deleted (if not obvious). 5 U.S.C. § 552(a)(6)(F).

CHAPTER 2 EXEMPTIONS PERMITTING WITHHOLDING

2.1 Exemption 1: Classified Documents.

a. While disclosure is the normal rule under the Freedom of Information Act, Congress recognized that certain internal matters are appropriately kept from the public. Among these are national security matters which are classified pursuant to Executive Order. In the 1974 amendments to the Freedom of Information Act, Congress provided that classified records are exempt from release only if they are "in fact properly classified pursuant to [the] Executive Order." 5 U.S.C. § 552(b)(l). This change is discussed by the Attorney General in a memorandum for federal executive departments and agencies.

> Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (February 1975) [hereinafter cited as Attorney General's 1975 Memorandum]

> PART I. AMENDMENTS PERTAINING TO THE SCOPE AND APPLICATION OF THE EXEMPTIONS

> I-A.CHANGES IN EXEMPTION l (CLASSIFIED NATIONAL DEFENSE AND FOREIGN POLICY RECORDS) AND THE PROVISION CONCERNING IN CAMERA INSPECTIONS

> The 1974 Amendments modify the national defense and foreign policy exemption of the Act, 5 U.S.C. § 552(b)(l), and add an express provision concerning in camera judicial inspection of records sought to be withheld under any exemption, including exemption l. The change in exemption l primarily affects the procedures and standards applicable to an agency's processing of requests for classified records. The provision concerning in camera judicial inspection affects the manner in which a court may treat classified records which an agency seeks to withhold.

> AMENDMENT OF EXEMPTION 1

> Exemption 1 of the 1966 Act authorized the withholding of information "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." As amended, exemption l will permit the withholding of matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." The previous language established a standard which essentially was met whenever a record was marked "Top Secret," "Secret," or "Confidential" pursuant to authority in an Executive order

such as No. 10501 or its successor, No. 11652. The more detailed standard of the amended exemption limits its applicability to information which, as noted in the Conference Report, "is 'in fact, properly classified' pursuant to both procedural and substantive criteria contained in such Executive order." (Conf. Rept. P. 12.)

When it is not possible to make the necessary determination within the time limits established by 1974 Amendments, because of the volume, the complexity, or the inaccessibility of the records encompassed by the request, it will frequently be desirable to negotiate a time arrangement for processing the request mutually acceptable to the requester and the agency. . . . If in such circumstances a requester is unwilling to enter into an arrangement of this nature, an agency will be compelled to rely upon the original classification marking until classification review can be accomplished. Such review must proceed as rapidly as possible.

When requested records contain information classified by the agency receiving the request, but as to which one or more other agencies have a subject matter interest, the agency receiving the request must process and act upon it without referral. Any interagency consultation required by the Executive Order or otherwise desired must be completed within the time limits established by the Act. Agencies consulted in such circumstances must provide guidance to the primary agency as rapidly as possible in view of the time constraints.

IN CAMERA INSPECTION WITH RESPECT TO EXEMPTION 1

The terms of the amended Act authorize a court to examine classified records in camera to determine the propriety of the withholding under the new substantive standards of the exemption. The Conference Report makes clear, however, that "in camera examination need not be automatic" and that before a court orders in camera inspection "the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure." (Conf. Rept. P. 9.) The Conference Report also emphasizes congressional recognition that:

> [T]he Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that Federal courts, in making de novo determinations in section § 552(b)(1) cases under the Freedom of Information law, will accord substantial weight to an agency's affidavit

concerning the details of the classified status of the disputed record. (p.12)

A recent Court of Appeals decision--not involving a Freedom of Information Act request, but taking account of the amendment of exemption 1 and the new provision for in camera inspection--comports with this legislative view. It affirms the need for judicial restraint in the field of national security information and the appropriateness of judicial deference to classification decisions made and reviewed administratively in accordance with the provisions of Executive Order 11652, particularly decisions reflecting the expertise and independent judgment of the interagency review body established under that Order.

In his veto of the 1974 Amendments, accompanied by suggestions for acceptable revisions, the President had expressed concern that the Amendments posed serious problems, including a problem of constitutional dimensions, to the extent that they authorized a court to overturn an Executive classification decision which had a reasonable basis. To avoid this difficulty, the President proposed:

> "that where classified documents are requested, the courts could review the classification, but would have to uphold the classification if there is a reasonable basis to support it. In determining the reasonableness of the classification, the courts would consider all attendant evidence prior to resorting to an in camera examination of the document." Veto Message, 10 Weekly Compilation of Presidential Documents 1318 (1974).

The language of the bill was not changed, but Congressman Moorhead, House manager of the bill and a conferee for the House, after quoting this portion of the President's veto message, stated: "[I]n the procedural handling of such cases under the Freedom of Information Act, this is exactly the way the courts would conduct their proceedings." (120 Cong. Rec. H 10865 (November 20, 1974).)

In Environmental Protection Agency v. Mink, 410 U.S. 73 (1973), the Supreme Court acknowledged the power of Congress to alter the Court's holding of unreviewability of classification decisions. It expressly recognized, however, that this power was subject "to whatever limitations the Executive privilege may be held to impose upon such congressional ordering." 410 U.S. at 83. The Amendments, in other words, do not affect the responsibility of the President to protect certain Executive branch information to the extent that such responsibility is conferred upon him by the Constitution; and they do not

enlarge the power of the courts insofar as that Presidential function is concerned.

---

b. The Court of Appeals for the District of Columbia Circuit has considered the question of in camera inspection of classified records in Freedom of Information Act litigation.

Ray v. Turner
587 F.2d 1187 (D.C. Cir. 1978)
[Footnotes omitted.]

[This case is a suit brought under the Freedom of Information Act seeking disclosure of any files maintained by the Central Intelligence Agency (CIA) on the plaintiffs. The district court denied plaintiff's motion for in camera inspection and upheld the government's withholding on the basis of Exemptions 1 and 3.

In denying in camera inspection, the district court relied on Weissman v. CIA, 565 F.2d 692 (D.C. Cir. 1977). It specifically relied on the passage holding that:

> [t]he affidavits in this record are specific and detailed. The record further indicates that the Agency dealt with plaintiffs' requests in a conscientious manner and released segregable portions of the material. No abuse of discretion has been shown.

The original decision in Weissman further held that Congress had recognized the lack of judicial expertise in reviewing national security cases by indicating that courts should not substitute their judgment for that of the agency.

In fact, Congress had not permitted such deference, and the original version of Weissman was corrected by the D.C. Circuit by amendment. A number of courts, including the district court in this case, erroneously have continued to rely upon the original version.]

. . . .

B. The Nature of De Novo Review.

Procedures to be observed

In Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820, (1973) cert. denied, 415 U.S. 977 (1974), this court sought to cope with the difficulty of providing de novo review of exemptions claimed by the government. It initiated procedures designed to mitigate the administrative burden on the

courts and ensure that the burden of justifying claimed exemptions would in fact be borne by the agencies to whom it had been assigned by Congress.

The court took its cue from a portion of the Supreme Court's Mink opinion that was not overruled by Congress--the portion discussing how a court should proceed when there is a factual dispute concerning the nature of the materials being withheld. "Expanding" on the Supreme Court's "outline," the court established the following procedures: (1) A requirement that the agency submit a "relatively detailed analysis [of the material withheld] in manageable segments." "[C]onclusory and generalized allegations of exemptions" would no longer be accepted by reviewing courts. 484 F.2d at 826. (2) "[A]n indexing system [that] would subdivide the document under consideration into manageable parts cross-referenced to the relevant portion of the Government's justification." Id. at 827. This index would allow the district court and opposing counsel to locate specific areas of dispute for further examination and would be an indispensable aid to the court of appeals reviewing the district court's decision. (3) "[A]dequate adversary testing" would be ensured by opposing counsel's access to the information included in the agency's detailed and indexed justification and by in camera inspection, guided by the detailed affidavit and using special masters appointed by the court whenever the burden proved to be especially onerous. Id. at 828.

. . . .

The salient characteristics of de novo review in the national security context can be summarized as follow: (1) The government has the burden of establishing an exemption. (2) The court must make a de novo determination. (3) In doing that, it must first "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record." (4) Whether and how to conduct an in camera examination of the documents rests in the sound discretion of the court, in national security cases as in all other cases. To these observations should be added an excerpt from our opinion in Weissman (as revised): "If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated."

In part, the foregoing considerations were developed for Exemption 1. They also apply to Exemption 3 when the statute providing criteria for withholding is in furtherance of national security interests.

In camera inspection

In the case at bar, the district court observed: "With respect to documents withheld under exemption 3, in camera inspection is seldom, if ever, necessary or appropriate." The legislative history does not support that conclusion. Congress left the matter of in camera inspection to the discretion of the district court, without any indication of the extent of its proper use. The ultimate criterion is simply this: Whether the district judge believes that in camera inspection is needed in order to make a responsible de novo determination on the claims of exemption.

In camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that "it can't hurt." When an agency affidavit or other showing is specific, there may be no need for in camera inspection.

On the other hand, when the district judge is concerned that he is not prepared to make a responsible de novo determination in the absence of in camera inspection, he may proceed in camera without anxiety that the law interposes an extraordinary hurdle to such inspection. The government would presumably prefer in camera inspection to a ruling that the case stands in doubt or equipoise and hence must be resolved by a ruling that the government has not sustained its burden.

The issue of bad faith merits a word. The memorandum of the district court noted that there was no evidence of bad faith on the part of the Agency's officials. Where the record contains a showing of bad faith, the district court would likely require in camera inspection. But the government's burden does not mean that all assertions in a government affidavit must routinely be verified by audit. Reasonable specificity in affidavits connotes a quality of reliability. When an affidavit or showing is reasonably specific and demonstrates, if accepted, that the documents are exempt, these exemptions are not to be undercut by mere assertion of claims of bad faith or misrepresentation.

In camera inspection does not depend on a finding or even tentative finding of bad faith. A judge has discretion to order in camera inspection on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a de novo determination. Government officials who would not stoop to misrepresentation may reflect an inherent tendency to resist disclosure, and judges may take this natural inclination into account.

For further refinement of the appropriate standard for judicial review of national security claims under Exemption 1 and use of in camera inspection, see Halperin v. CIA, 629 F.2d 144 (D.C. Cir. 1980), Military Audit Project v. Casey, 656 F.2d 724 (D.C. Cir. 1981),

Taylor v. Department of the Army, 684 F.2d 99 (D.C. Cir. 1982), and McGehee v. CIA, 711 F.2d 1076 (D.C. Cir. 1983). A review of the cases demonstrates that courts have deferred to agency expertise in national security cases, after examining publicly filed affidavits which in some cases are supplemented by in camera affidavits or an in camera examination of the documents by the judge.

c. Exemption 1 protects matters that are specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy. The applicable executive order, in effect since October 16, 1995, is Executive Order 12,958, which recognizes three levels of classification-Top Secret, Secret, and Confidential - and several classification categories, including military plans, weapons systems or operations; foreign government information; intelligence activities, intelligence sources or methods, or cryptology; foreign relations or foreign activities of the United States; scientific, technological, or economic matters relating to the national security; United States Government programs for safeguarding nuclear materials or facilities; and vulnerabilities or capabilities of systems, installations, projects or plans relating to national security.

Recognizing the dramatic changes that have altered the national security threats in recent years, President Clinton declared, when promulgating the new Executive Order, that "these changes provide a greater opportunity to emphasize our commitment to open Government." This is accomplished by setting a 10-year limit for most newly classified information and providing for automatic declassification of 25-year-old information, both of which are subject to narrowly drawn exceptions. Executive Order 12,958 authorizes officials to consider whether the "public interest" in disclosure outweighs the national security interest in classification of the information and requires the creation of a government wide declassification database under the auspices of the National Archives and Records Administration. The new order also eliminates the current presumption that certain categories of national security information are classified and provides that "if there is significant doubt about the need to classify information, it should not be classified."

2.2 Exemption 2: Internal Personnel Rules and Practices.

a. The Freedom of Information Act's second exemption pertains to matters that are "related solely to the internal personnel rules and practices of an agency." The Supreme Court has resolved some of the issues involved in Exemption 2 litigation.

Department of the Air Force v. Rose
425 U.S. 352 (1976)
[Footnotes omitted.]

. . . .

Mr. Justice Brennan delivered the opinion of the Court.

Respondents, student editors or former student editors of the New York University Law Review researching disciplinary systems and procedures at the military service academies for an article for the Law Review, were denied access by petitioners to case summaries of honor and ethics hearings, with personal references or other identifying information deleted, maintained in the United States Air Force Academy's Honor and Ethics Code Reading Files, although Academy practice is to post copies of such summaries on 40 squadron bulletin boards throughout the Academy and to distribute copies to Academy faculty and administration officials. Thereupon respondents brought this action under the Freedom of Information Act, as amended, 5 USC § 552, in the District Court for the Southern District of New York against petitioners, the Department of the Air Force and Air Force officers who supervise cadets at the United States Air Force Academy (hereinafter collectively the "Agency"). The District Court granted petitioner Agency's motion for summary judgment--without first requiring production of the case summaries for inspection--holding in an unreported opinion that case summaries even with deletions of personal references or other identifying formation were "matters . . . related solely to the internal personnel rules and practices of an agency," exempted from mandatory disclosure by § 552(b)(2) of the statute. The Court of Appeals for the Second Circuit reversed, holding that § 552(b)(2) did not exempt the case summaries from mandatory disclosure. 495 F.2d 261 (1974). . . .

. . . .

We granted certiorari, 420 U.S. 923 (1975). We affirm.

I.

The District Court made factual findings respecting the administration of the Honor and Ethics Codes at the Academy. See Petition for Certiorari, at 28A-29A nn 5, 6. Under the Honor Code enrolled cadets pledge that "We will not lie, steal, or cheat, nor tolerate among us anyone who does." The Honor Code is administered by an Honor Committee composed of Academy cadets. Suspected violations of the Code are referred to the Chairman of the Honor Committee, who appoints a three-cadet investigatory team which, with advice from the legal advisor, evaluates the facts and determines whether a hearing, before a Board of eight cadets, is warranted. If the team finds no hearing warranted, the case is closed. If it finds there should be a hearing, the accused cadet may call witnesses to testify in his behalf, and each cadet squadron may ordinarily send two cadets to observe.

At the announcement of the verdict, the Honor Committee Chairman reminds all cadets present at the hearing that all matters discussed at the

hearing are confidential and should not be discussed outside the room with anyone other than an Honor Representative. A case summary consisting of a brief statement, usually only one page, of the significant facts is prepared by the Committee. As we have said, copies of the summaries are posted on 40 squadron bulletin boards throughout the Academy, and distributed among Academy faculty and administration officials. Cadets are instructed not to read the summaries, unless they have a need, beyond mere curiosity, to know their contents, and the Reading Files are covered with a notice that they are "for official use only." Case summaries for not guilty and discretion cases are circulated with names deleted; in guilty cases, the guilty cadet's name is not deleted from the summary, but posting on the bulletin boards is deferred until after the guilty cadet has left the Academy.

Ethics Code violations are breaches of conduct less serious than Honor Code violations, and administration of Ethics Code cases is generally less structured, though similar. In many instances, Ethics cases are handled informally by the Cadet Squadron Commander, the Squadron Ethics Representative, and the individual concerned. These cases are not necessarily written up and no complete file is maintained; a case is written up and the summary placed in back of the Honor Code Reading Files only if it is determined to be of value for the Cadet population. Distribution of Ethics Code summaries is substantially the same as that of Honor Code summaries, and their confidentiality, too, is maintained by Academy custom and practice.

. . . .

III

The phrasing of Exemption 2 is traceable to congressional dissatisfaction with the exemption from disclosure under former ə 3 of the Administrative Procedure Act of "any matter relating solely to the internal management of an agency." 5 U.S.C. § 1002 (1964). The sweep of that wording led to withholding by agencies from disclosure of matter "rang[ing] from the important to the insignificant." H.R. Rep. No. 1497, 89th Cong, 2d Sess., at 5 (1966) (hereinafter H.R. Rep. No. 1497). An earlier effort at minimizing this sweep, S. 1666 introduced in the 88th Congress in 1963, applied the "internal management" exemption only to matters required to be published in the Federal Register; agency orders and records were exempted from other public disclosure only when the information related "solely to the internal personnel rules and practices of any agency." The distinction was highlighted in the Senate Report on S. 1666 by reference to the latter as the "more tightly drawn" exempting language. S. Rep. No. 1219, 88th Cong., 2d Sess., 12 (1964).

No final action was taken on S. 1666 in the 88th Congress; the Senate passed the Bill, but it reached the House too late for action. Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 18 n.18 (1974). But the Bill introduced in the Senate in 1965 that became law in 1966 dropped the "internal management" exemption for matters required to be published in the Federal Register and consolidated all exemptions into a single subsection. Thus, legislative history plainly evidences the congressional conclusion that the wording of Exemption 2, "internal personnel rules and practices," was to have a narrower reach than the Administrative Procedure Act's exemption for "internal management."

But that is not the end of the inquiry. The House and Senate Reports on the Bill finally enacted differ upon the scope of the narrowed exemption. The Senate Report stated:

> "Exemption 2 relates only to the internal personnel rules and practices of an agency. Examples of these may be rules as to personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like." S. Rep. No. 813, p. 8.

The House Report, on the other hand, declared

> "2. Matters related solely to the internal personnel rules and practices of any agency. Operating rules, guidelines and manuals of procedure for Government investigators or examiners would be exempt from disclosure but this exemption would not cover all 'matters of internal management' such as employee relations and working conditions and routine administrative procedures which are withheld under the present law." H.R. Rep. No. 1497, p. 10.

Almost all courts that have considered the difference between the Reports have concluded that the Senate Report more accurately reflects the congressional purpose. Those cases relying on the House, rather than the Senate, interpretation of Exemption 2, and permitting Agency withholding of matters of some public interest, have done so only where necessary to prevent the circumvention of agency regulations that might result from disclosure to the subjects of regulation of the procedural manuals and guidelines used by the agency in discharging its regulatory function. See, e.g., Tietze v. Richardson, 342 F. Supp. 610 (S.D. Tex. 1972); Cuneo v. Laird, 338 F. Supp. 504 (D.C. 1972); rev'd on other grounds sub nom. Cuneo v. Schlesinger, 157 U.S. App. D.C. 368, 484 F.2d 1086; City of Concord v. Ambrose, 333 F. Supp. 958 (N.D. Cal. 1971)(dictum). Moreover, the legislative history indicates that this

was the primary concern of the committee drafting the House Report. See Hearings on H.R. 5012 before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess., 29-30 (1965), cited in H.R. Rep. No. 1497, p. 10 n.14. We need not consider in this case the applicability of Exemption 2 in such circumstances, however, because, as the Court of Appeals recognized, this is not a case "where knowledge of administrative procedures might help outsiders to circumvent regulations or standards. Release of the [sanitized] summaries, which constitute quasi-legal records, poses no such danger to the effective operation of the Codes at the Academy." 495 F.2d, at 265 (footnote omitted). Indeed, the materials sought in this case are distributed to the subjects of regulation, the cadets, precisely in order to assure their compliance with the known content of the Codes.

It might appear, nonetheless, that the House Report's reference to "[o]perating rules, guidelines, and manuals of procedure" supports a much broader interpretation of the exemption than the Senate Report's circumscribed examples. This argument was recently considered and rejected by Judge Wilkey speaking for the Court of Appeals of the District of Columbia Circuit in Vaughn v. Rosen, 173 U.S. App. D.C. at 193-194, 523 F.2d 1136, 1142 (1975):

> "Congress intended that Exemption 2 be interpreted narrowly and specifically. In our view, the House Report carries the potential of exempting a wide swath of information under the category of operating rules, guidelines, and manuals of procedure. . . .The House Report states that the exemption 'would not cover all "matters of internal management" such as employee relations and working conditions and routine administrative procedures . . . and yet it gives precious little guidance as to which matters are covered by the exemption and which are not. Although it is equally terse, the Senate Report indicates that the line sought to be drawn is one between minor or trivial matters and those more substantial matters which might be the subject of legitimate public interest.
>
> "This is a standard, a guide, which an agency and then a court, if need be, can apply with some certainty, consistency and clarity.
>
> . . . .
>
> "Reinforcing this interpretation is 'the clear legislative intent [of FOIA] to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests.' [Soucie v. David, 145 U.S. App. D.C.

144, 157, 448 F.2d 1067, 1080 (1971)]. As a result, we have repeatedly stated that '[t]he policy of the Act requires that the disclosure requirements be construed broadly, the exemptions narrowly.' [Ibid.; Vaughn v. Rosen, 157 U.S. App. D.C. 340, 343, 484 F.2d 820, 823 (1973).] Thus, faced with a conflict in the legislative history, the recognized principal purpose of the FOIA requires us to choose that interpretation most favoring disclosure.

"The second major consideration favoring reliance upon the Senate Report is the fact that it was the only committee report that was before both houses of Congress. The House unanimously passed the Senate Bill without amendment, therefore no conference committee was necessary to reconcile conflicting provisions. . . .

". . . [W]e as a court viewing the legislative history must be wary of relying upon the House Report, or even the statements of House sponsors, where their views differ from those expressed in the Senate. As Professor Davis said: 'The basic principle is quite elementary: The content of the law must depend upon the intent of both Houses, not of just one.' [See generally K. Davis, Administrative Law Treatise, § 3A.31 (1970 Supp.), p. 175.] By unanimously passing the Senate Bill without amendment, the House denied both the Senate Committee and the entire Senate an opportunity to object (or concur) to the interpretation written into the House Report (or voiced in floor colloquy). This being the case, we choose to rely upon the Senate Report."

For the reasons stated by Judge Wilkey, and because we think the primary focus of the House Report was on exemption of disclosures that might enable the regulated to circumvent agency regulation, we too "choose to rely upon the Senate Report" in this regard.

The District Court had also concluded in this case that the Senate Report was "the surer indication of congressional intent." Pet. for Cert. 34A n.21. The Court of Appeals found it unnecessary to take "a firm stand on the issue," concluding that "the difference of approach between the House and Senate Reports would not affect the result here." 495 F.2d, at 265. The different conclusions of the two courts in applying the Senate Report's interpretation centered upon a disagreement as to the materiality of the public significance of the operation of the Honor and Ethics Codes. The District Court based its conclusion on a determination that the Honor and Ethics Codes

"[b]y definition . . . are meant to control only those people in the agency. . . . The operation of the Honor Code cannot possibly affect anyone outside its sphere of voluntary participation which is limited by its function and its publication to the Academy." Pet. for Cert. 34A. The Court of Appeals on the other hand concluded that under "the Senate construction of Exemption Two, [the] case summaries . . . clearly fall outside its ambit" because "[s]uch summaries have substantial potential for public interest outside the Government." 495 F.2d, at 265.

We agree with the approach and conclusion of the Court of Appeals. The implication for the general public of the Academy's administration of discipline is obvious, particularly so in light of the unique role of the military. What we have said of the military in other contexts has equal application here: it "constitutes a specialized community governed by a separate discipline from that of the civilian," Orloff v. Willoughby, 345 U.S. 83, 94 (1953), in which the internal law of command and obedience invests the military officer with "a particular position of responsibility." Parker v. Levy, 417 U.S. 733, 744 (1974). Within this discipline, the accuracy and effect of a superior's command depends critically upon the specific and customary reliability of subordinates, just as the instinctive obedience of subordinates depends upon the unquestioned specific and customary reliability of the superior. The importance of these considerations to the maintenance of a force able and ready to fight effectively renders them undeniably significant to the public role of the military. Moreover, the same essential integrity is critical to the military's relationship with its civilian direction. Since the purpose of the Honor and Ethics Codes administered and enforced at the Air Force Academy is to ingrain the ethical reflexes basic to these responsibilities in future Air Force officers, and to select out those candidates apparently unlikely to serve these standards, it follows that the nature of this instruction--and its adequacy or inadequacy--is significantly related to the substantive public role of the Air Force and its Academy. Indeed, the public's stake in the operation of the Codes as they affect the training of future Air Force officers and their military careers is underscored by the Agency's own proclamations of the importance of cadet-administered Codes to the Academy's educational and training program. Thus, the Court of Appeals said, and we agree:

> "[Respondents] have drawn our attention to various items such as newspaper excerpts, a press conference by an Academy officer and a White House Press Release, which illustrate the extent of general concern with the working of the Cadet Honor Code. As the press conference and the Press Release show, some of the interest has been generated--or at least enhanced--by acts of the Government itself. Of course, even without such official encouragement, there would be

> interest in the treatment of cadets, whose education is publicly financed and who furnish a good portion of the country's future military leadership. Indeed, all sectors of our society, including the cadets themselves, have a stake in the fairness of any system that leads in many instances, to the forced resignation of some cadets. The very study involved in this case bears additional witness to the degree of professional and academic interest in the Academy's student-run system of discipline. . . . [This factor] differentiate[s] the summaries from matters of daily routine like working hours, which, in the words of Exemption Two, do relate 'solely to the internal personnel rules and practices of an agency.'" 495 F.2d, at 265 (emphasis in Court of Appeals opinion).
>
> In sum, we think that, at least where the situation is not one where disclosure may risk circumvention of agency regulation, Exemption 2 is not applicable to matters subject to such a genuine and significant public interest. The exemption was not designed to authorize withholding of all matters except otherwise secret law bearing directly on the propriety of actions of members of the public. Rather, the general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest. The case summaries plainly do not fit that description. They are not matter with merely internal significance. They do not concern only routine matters. Their disclosure entails no particular administrative burden. We therefore agree with the Court of Appeals that, given the Senate interpretation, "the Agency's withholding of the case summaries (as edited to preserve anonymity) cannot be upheld by reliance on the second exemption." Id., at 266.
>
> . . . .

---

b. A case authorizing the withholding of mundane administrative matters unrelated to personnel practice is Founding Church of Scientology v. Smith, 721 F.2d 828 (D.C. Cir. 1983). Note, however, that the D.C. Circuit cautioned that "a reasonably low threshold should be maintained for determining when withheld administrative material relates to significant public interest." Id. at 830-31 n.4.

c. The Government has also sought to protect sensitive internal agency instructions to investigators, inspectors, auditors, and other law enforcement personnel under Exemption 2. See, e.g., DOD Regulation 5400.7-R, para. 3-200 (Oct 1990) and AR 25-55, para. 3-200 (Jan 1990). The Supreme Court expressly left open in Rose whether Exemption 2 permits withholding where disclosure would risk circumvention of agency regulation. The

Government has been successful in protecting sensitive internal instructions, but not always on the strength of the circumvention of agency regulation theory. Compare Caplan v. BATF, 587 F.2d 554 (2d Cir. 1978) with Jordan v. United States Dep't of Justice, 591 F.2d 753 (D.C. Cir. 1978) and Cox v. United States Dep't of Justice, 601 F.2d 1 (D.C. Cir. 1979). The District of Columbia Circuit in Crooker v. BATF, 670 F.2d 1051 (D.C. Cir. 1981) (en banc) has recognized the circumvention theory thereby clarifying the law in that circuit.

d. In Schwaner v. Department of the Air Force, 898 F.2d 793 (D.C. Cir. 1990), the D.C. Circuit rejected an Exemption 2 claim and granted a commercial request for a list of the names and duty addresses of military personnel stationed at Bolling Air Force Base, holding that it did not meet the exemption's threshold requirement of being "related solely to the internal rules and practices of an agency."

2.3 Exemption 3: Statutory Restrictions on Disclosure.

a. The third exemption was intended to make the Act consistent with other federal withholding statutes. Exemption 3 protects material which another federal statute protects, provided that the other federal statute either (1) requires that the matters be withheld or (2) establishes particular criteria for withholding or refers to particular types of matters to be withheld. Exemption 3 statutes utilized by the military services include 10 U.S.C. § 1102 (DOD medical quality assurance records), 10 U.S.C. § 2305 (certain contract proposals not incorporated or set forth in an awarded contract), 41 U.S.C. § 423 (Procurement Integrity Act), and 42 U.S.C. § 290dd-e (patient records of enrollees in drug and alcohol treatment programs).

b. From 1982 through late 1984 the Department of Justice advocated the controversial position that the systemic exemptions of the Privacy Act, 5 U.S.C. § 552a(j)(1) and (2), served as a statutory bar to first-person disclosures under FOIA's Exemption 3. After a split in the circuit courts of appeal, the Supreme Court agreed to resolve the issue. See Provenzano v. Department of Justice, 717 F.2d 779 (3rd Cir.), cert. granted, 466 U.S. 926 (1984); and Shapiro v. DEA, 721 F.2d 215 (7th Cir. 1983), cert. granted, 466 U.S. 926 (1984). However, as a part of the Central Intelligence Information Act, Congress specified that the Privacy Act may not serve as an Exemption 3 statute under the FOIA. See Pub. L. 98-477, 98 Stat. 2209, Sec. 2(c) (effective Oct. 15, 1984) (amending what is now subsection (t) of the Privacy Act, 5 U.S.C. § 552a(t). Consequently, the Supreme Court dismissed the issue as moot, see 469 U.S. 413 (1984).

c. Another hotly debated Exemption 3 issue was whether the Trade Secrets Act, 18 U.S.C. § 1905, is within the exemption. The Justice Department asserted that it was not; however, the Supreme Court in Chrysler v. Brown, 441 U.S. 281 (1979) expressly did not decide the issue. The issue was finally settled in CNA Financial Corp v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), which held the Trade Secrets Act is not an Exemption 3 statute. Accord Anderson v. HHS, 907 F.2d 936 (10th Cir. 1990); Acumenics Research & Technology

v. Department of Justice, 843 F.2d 800 (4th Cir. 1988). The "Trade Secrets Act" will be discussed further in paragraphs 2.4c and d concerning Exemption 4.

2.4 Exemption 4: Trade Secrets and Financial Information.

a. This exemption applies to two categories of information in federal agency records:

(1) trade secrets, or

(2) information which is

(a) commercial or financial, and

(b) obtained from a person, and

(c) confidential or privileged.

To determine whether the particular information is a trade secret, several courts have referred to the definition of a trade secret contained in the Restatement of Torts, 4 Restatements of Torts § 757, comment on clause (b) (1939). In a departure from that accepted definition, the U.S. Circuit Court of Appeals for the District of Columbia has adopted a more restrictive "common law" definition of "trade secret" as used in Exemption 4. The new definition covers only a "secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Public Citizens Health Research Group v. FDA, 704 F.2d 1280 (D.C. Cir. 1983). In 1990, the Tenth Circuit Court of Appeals adopted the D.C. Circuit's test for "trade secrets." Anderson v. HHS, 907 F.2d 936 (10th Cir. 1990). Because either definition is more restrictive than the other category, confidential business information, trade secrets may be entitled to absolute protection under Exemption 4. See Martin Marietta Corp. v. FTC, 475 F. Supp. 338 (D.D.C. 1979); and Union Oil Co. v. FPC, 542 F.2d 1036 (9th Cir. 1976). Due to the protection extended by the courts in the release of trade secrets, there has been little litigation in this area. Most Exemption 4 cases concern whether the records contain confidential information.

b. To come within the meaning of confidential commercial or financial information the information must satisfy all three of the criteria set forth in the second category in the paragraph above. See, e.g., Gulf & Western Industries, Inc. v. U.S., 615 F.2d 527, 529 (D.C. Cir. 1979). An important question addressed by the courts is the meaning of the word "confidential" in the context of Exemption 4. The leading case in the area is National Parks.

National Parks and Conservation
Association v. Morton
498 F.2d 765 (D.C. Cir. 1974)

[Footnotes omitted.]

Before BAZELON, Chief Judge, and WRIGHT and TAMM, Circuit Judges.

TAMM, Circuit Judge:

Appellant brought this action under the Freedom of Information Act, 5 U.S.C. § 552 (1970), seeking to enjoin officials of the Department of the Interior from refusing to permit inspection and copying of certain agency records concerning concessions operated in the national parks. The district court granted summary judgment for the defendant on the ground that the information sought is exempt from disclosure under section 552(b)(4) of the Act which states:

(b) This section does not apply to matters that are--

. . . .

> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . .

In order to bring a matter (other than a trade secret) within this exemption, it must be shown that the information is (a) commercial or financial, (b) obtained from a person, and (c) privileged or confidential. Getman v. NLRB, 146 U.S.App.D.C. 209, 450 F.2d 670, 673 (1971), quoting Consumers Union of United States, Inc. v. Veterans Administration, 301 F. Supp. 796, 802 (S.D.N.Y. 1969), appeal dismissed, 436 F.2d 1363 (2d Cir. 1971). Since the parties agree that the matter in question is financial information obtained from a person and that it is not privileged, the only issue on appeal is whether the information is "confidential" within the meaning of the exemption.

I.

Unfortunately, the statute contains no definition of the word "confidential." In the past, our decisions concerning this exemption have been guided by the following passage from the Senate Report, particularly the italicized portion:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added), cited in Sterling Drug, Inc. v. FTC, 146 U.S.App.D.C. 237, 450 F.2d 698, 709 (1971); Grumman Aircraft Engineering Corp. v. Renegotiation Board, 138 U.S.App.D.C. 147, 425 F.2d 578, 582 (1970). We have made it clear, however, that the test for confidentiality is an objective one. Bristol-Myers Co. v. FTC, 138 U.S.App.D.C. 22, 424 F.2d 935, 938, cert. denied, 400 U.S. 824, 91 S.Ct. 46, 27 L. Ed. 2d 52 (1970); cf. Benson v. General Services Administration, 289 F. Supp. 590, 594 (W.D. Wash. 1968), aff'd, 415 F.2d 878 (9th Cir. 1969). Whether particular information would customarily be disclosed to the public by the person from whom it was obtained is not the only relevant inquiry in determining whether that information is "confidential" for purposes of section 552(b)(4). A court must also be satisfied that non-disclosure is justified by the legislative purpose which underlies the exemption. Our first task, therefore, is to ascertain the ends which Congress sought to attain in enacting the exemption for "commercial or financial" information.

In general, the various exemptions included in the statute serve two interests--that of the Government in efficient operation and that of persons supplying certain kinds of information in maintaining its secrecy. The Senate Report acknowledges both of these legislative goals:

> At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.

S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Some of the exemptions serve only one or the other of the two interests. The exemption for "inter-agency or intra-agency memorandums" is an example of an exemption intended to protect the orderly conduct of official business. On the other hand, the exemption for "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" is clearly intended for the benefit of the individual from whom information is obtained. The exemption with which we are presently concerned has a dual purpose. It is intended to protect interests of both the Government and the individual.

The "financial information" exemption recognizes the need of government policymakers to have access to commercial and financial data.

Unless persons having necessary information can be assured that it will remain confidential, they may decline to cooperate with officials and the ability of the Government to make intelligent, well informed decisions will be impaired. This concern finds expression in the legislative history as well as the case law. During debate on a predecessor to the bill which was ultimately enacted, Senator Humphrey pointed out that sources of information relied upon by the Bureau of Labor Statistics would be "seriously jeopardized" unless the information collected by the Bureau was exempt from disclosure. He was assured that such information was fully protected under the exemption as it then appeared. Although the exemption now contains the additional qualifying words "commercial or financial" the purpose of protecting government access to necessary data remains. As the Senate Report explains:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries. . . .

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added). The House Report states with respect to section 552(b)(4):

> It would also include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.

H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), U.S. Code Cong. & Admin. News 1966 at 2427. This court has formulated a similar definition of the governmental interest protected by the exemption:

> This exemption is intended to encourage individuals to provide certain kinds of confidential information to the Government, and it must be read narrowly in accordance with that purpose.

Soucie v. David, 145 U.S.App.D.C. 144, 448 F.2d 1067, 1078 (1971).

Apart from encouraging cooperation with the Government by persons having information useful to officials, section 552(b)(4) serves another distinct but equally important purpose. It protects persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication. The need for such protection was raised several times during hearings on S. 1966, the predecessor of the bill which became law. As introduced, this bill contained no exemption for trade secrets or commercial or financial information. Among the witnesses who

pointed out this deficiency was a representative of the National Association of Broadcasters who testified that broadcasters are required to file business information with the Federal Communications Commission which, if not exempt from public disclosure, could be exploited by competitors. A member of the subcommittee which conducted the hearings raised the issue again with respect to Small Business Administration loan applications:

> I am thinking of a situation, for example, where the company couldn't qualify for funds, and they have exposed their predicament to the world and it might give competitors unfair advantage to know their weak condition at that time. I wonder if there might be some cases where it might be in the public interest if all the facts about a company were not made public.

A representative of the Treasury Department added similar comments:

> We can see no reason for changing the ground rules of American business so that any person can force the Government to reveal information which relates to the business activities of his competitor.

In each of these instances it was suggested that an exemption for "trade secrets" would avert the danger that valuable business information would be made public by agencies which had obtained it pursuant to statute or regulation. A representative of the Department of Justice endorsed this idea at length:

> A second problem area lies in the large body of the Government's information involving private business data and trade secrets, the disclosure of which could severely damage individual enterprise and cause widespread disruption of the channels of commerce. Much of this information is volunteered by employers, merchants, manufacturers, carriers, exporters, and other businessmen and professional people for purposes of market news services, labor and wage statistics, commercial reports, and other Government services which are considered useful to the cooperating reporters, the public and the agencies. Perhaps the greater part of such information is exacted, by statute, in the course of necessary regulatory or other governmental functions.
>
> Again, not only as a matter of fairness, but as a matter of right, and as a matter basic to our free enterprise system,

> private business information should be afforded appropriate protection, at least from competitors.

A particularly significant aspect of the latter statement is its recognition of a twofold justification for the exemption of commercial material: (l) encouraging cooperation by those who are not obliged to provide information to the government and (2) protecting the rights of those who must.

After the hearings, the bill was reported with amendments, one of which added the following exemption:

> . . . trade secrets and other information obtained from the public and customarily privileged or confidential . . . .

S. Rep. No. 1219, 88th Cong., 2d Sess. 2 (1964). Although the bill passed the Senate, Congress adjourned before the House of Representatives had completed action. The bill was reintroduced in the Senate in the following session with only two changes in the fourth exemption:

> . . . trade secrets and commercial or financial information obtained from the public and privileged or confidential . . . .

This version substitutes the words "commercial or financial" for the word "other" and deletes the word "customarily." No explanation was given for either change. During hearings on this bill, the question was again raised whether businessmen would be protected against disclosure of commercial or financial information obtained by the Government pursuant to administrative regulation. A witness testified that the Rural Electrification Administration requires detailed "financial, economic and technical" information from applicants under its loan program. Public release of this material, it was said, would provide an unfair advantage to a borrower's competitors. In reply, a member of the subcommittee stated: "Well, there is a specific exemption in here to cover that point, and I do not think anybody has any intention that this material be made public." After the hearings, the bill was reported with no significant amendment of the fourth exemption. The explanation of the fourth exemption was identical to that appearing in the Report on the previous bill except for the following significant addition:

> Specifically [the exemption] would include any commercial, technical, and financial data, submitted by an applicant or a borrower to a lending agency in connection with any loan application or loan.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). This history firmly supports the inference that section 552(b)(4) is intended for the benefit of persons who supply information as well as the agencies which gather it.

To summarize, commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (l) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

II.

The financial information sought by appellant consists of audits conducted upon the books of companies operating concessions in national parks, annual financial statements filed by the concessionaires with the National Park Service and other financial information. The district court concluded that this information was of the kind "that would not generally be made available for public perusal." While we discern no error in this finding, we do not think that, by itself, it supports application of the financial information exemption. The district court must also inquire into the possibility that disclosure will harm legitimate private or governmental interests in secrecy.

On the record before us the Government has no apparent interest in preventing disclosure of the matter in question. Some, if not all, of the information is supplied to the Park Service pursuant to statute. Whether supplied pursuant to statute, regulation or some less formal mandate, however, it is clear that disclosure of this material to the Park Service is a mandatory condition of the concessionaires' right to operate in national parks. Since the concessionaires are required to provide this financial information to the government, there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future.

As we have already explained, however, section 552(b)(4) may be applicable even though the Government itself has no interest in keeping the information secret. The exemption may be invoked for the benefit of the person who has provided commercial or financial information if it can be shown that public disclosure is likely to cause substantial harm to his competitive position. Appellant argues that such a showing cannot be made in this case because the concessionaires are monopolists, protected from competition during the term of their contracts and enjoying a statutory preference over other bidders at renewal time. In other words, appellant argues that disclosure cannot impair the concessionaires' competitive position because they have no competition. While this argument is very compelling, we are reluctant to accept it without first providing appellee the opportunity to

develop a fuller record in the district court. It might be shown, for example, that disclosure of information about concession activities will injure the concessioner's competitive position in a nonconcession enterprise. In that case disclosure would be improper. This matter is therefore remanded to the district court for the purpose of determining whether public disclosure of the information in question poses the likelihood of substantial harm to the competitive positions of the parties from whom it has been obtained. If the district court finds in the affirmative, then the information is "confidential" within the meaning of section 552(b)(4) and exempt from disclosure. If only some parts of the information are confidential, the district court may prevent inappropriate disclosures by excising from otherwise disclosable documents any matters which are confidential in the sense that the word has been construed in this opinion.

The judgment of the district court is reversed and this matter is remanded for further proceedings consistent with this opinion.

So ordered.

---

c. The Freedom of Information Act does not require the withholding of any records from the public--it merely authorizes federal agencies and departments to do so under certain circumstances. The Army, for example, has taken the position that exempt records will be released if no governmental interest will be jeopardized by release. AR 25-55 (April 1997). In response to a Freedom of Information Act request or otherwise, an agency may wish to release exempt records. When this situation arises or when an agency decides that certain records are not exempt from release under the Act, a third party who has an interest in maintaining the confidentiality of the records may sue to prevent their disclosure. These suits have come to be known as "reverse FOIA" cases.

Chrysler Corporation v. Brown
441 U.S. 281 (1979)
[Most footnotes omitted.]

Mr. Justice Rehnquist delivered the opinion of the Court.

. . . .

This case belongs to a class that has been popularly denominated "reverse-FOIA" suits. The Chrysler Corporation (hereinafter "Chrysler") seeks to enjoin agency disclosure on the grounds that it is inconsistent with the FOIA and 18 U.S.C. § 1905, a criminal statute with origins in the 19th century that proscribes disclosure of certain classes of business and personal information.

We agree with the Court of Appeals for the Third Circuit that the FOIA is purely a disclosure statute and affords Chrysler no private right of action to enjoin agency disclosure. But we cannot agree with that court's conclusion that this disclosure is "authorized by law" within the meaning of § 1905. Therefore, we vacate the Court of Appeals' judgment and remand so that it can consider whether the documents at issue in this case fall within the terms of § 1905.

I

As a party to numerous Government contracts, Chrysler is required to comply with Executive Orders 11246 and 11375, which charge the Secretary of Labor with ensuring that corporations who benefit from Government contracts provide equal employment opportunity regardless of race or sex. The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has promulgated regulations which require Government contractors to furnish reports and other information about their affirmative action programs and the general composition of their work forces.

The Defense Logistics Agency (DLA) (formerly the Defense Supply Agency) of the Department of Defense is the designated compliance agency responsible for monitoring Chrysler's employment practices. OFCCP regulations require that Chrysler make available to this agency written affirmative action programs (AAPs) and annually submit Employer Information Reports, known as EEO-1 Reports. The agency may also conduct "compliance reviews" and "complaint investigations," which culminate in Compliance Review Reports (CRRs) and Complaint Investigation Reports (CIRs), respectively.[4]

Regulations promulgated by the Secretary of Labor provide for public disclosure of information from records of the OFCCP and its compliance agencies. Those regulations state that notwithstanding exemption from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. § 552,

> "records obtained or generated pursuant to Executive Order 11246 (as amended) . . . shall be made available for inspection and copying . . . if it is determined that the requested inspection or copying furthers the public interest and does not impede any

[4] Id., §§ 60-1.20, 60-1.24. The term "alphabet soup" gained currency in the early days of the New Deal as a description of the proliferation of new agencies such as WPA and PWA. The terminology required to describe the present controversy suggests that the "alphabet soup" of the New Deal era was, by comparison, a clear broth.

> of the functions of the OFCC[P] or the Compliance Agencies except in the case of records disclosure of which is prohibited by law."

It is the voluntary disclosure contemplated by this regulation, over and above that mandated by the FOIA, which is the gravamen of Chrysler's complaint in this case.

. . . .

II

We have decided a number of FOIA cases in the last few years. Although we have not had to face squarely the question whether the FOIA ex proprio vigore forbids governmental agencies from disclosing certain classes of information to the public, we have in the course of at least one opinion intimated an answer. We have, moreover, consistently recognized that the basic objective of the Act is disclosure.

In contending that the FOIA bars disclosure of the requested equal employment opportunity information, Chrysler relies on the Act's nine exemptions and argues that they require an agency to withhold exempted material. In this case it relies specifically on Exemption 4:

> (b) [FOIA] does not apply to matters that are:
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential. . . . 5 U.S.C. § 552(b)(4).

Chrysler contends that the nine exemptions in general, and Exemption 4 in particular, reflect a sensitivity to the privacy interests of private individuals and nongovernmental entities. That contention may be conceded without inexorably requiring the conclusion that the exemptions impose affirmative duties on an agency to withhold information sought. In fact, that conclusion is not supported by the language, logic or history of the Act.

The organization of the Act is straightforward. Subsection (a), 5 U.S.C. § 552(a), places a general obligation on the agency to make information available to the public and sets out specific modes of disclosure for certain classes of information. Subsection (b), 5 U.S.C. § 552(b), which lists the exemptions, simply states that the specified material is not subject to the disclosure obligations set out in subsection (a). By its terms, subsection (b) demarcates the limits of the agency's obligation to disclose; it does not foreclose disclosure.

That the FOIA is exclusively a disclosure statute is, perhaps, demonstrated most convincingly by examining its provision for judicial relief. Subsection (a)(4)(B) gives federal district courts "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(b). That provision does not give the authority to bar disclosure, and thus fortifies our belief that Chrysler, and courts which have shared its view, have incorrectly interpreted the exemption provisions to the FOIA. The Act is an attempt to meet the demand for open government while preserving workable confidentiality in governmental decision-making. Congress appreciated that with the expanding sphere of governmental regulation and enterprise, much of the information within Government files has been submitted by private entities seeking Government contracts or responding to unconditional reporting obligations imposed by law. There was sentiment that Government agencies should have the latitude, in certain circumstances, to afford the confidentiality desired by these submitters. But the congressional concern was with the agency's need or preference for confidentiality; the FOIA by itself protects the submitters' interest in confidentiality only to the extent that this interest is endorsed by the agency collecting the information.

Enlarged access to governmental information undoubtedly cuts against the privacy concerns of nongovernmental entities, and as a matter of policy some balancing and accommodation may well be desirable. We simply hold here that Congress did not design the FOIA exemptions to be mandatory bars to disclosure.

. . . .

We therefore conclude that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford Chrysler any right to enjoin agency disclosure.

III

Chrysler contends, however, that even if its suit for injunctive relief cannot be based on the FOIA, such an action can be premised on the Trade Secrets Act, 18 U.S.C. § 1905. The Act provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in

> the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000 or imprisoned not more than one year, or both; and shall be removed from office or employment.

There are necessarily two parts to Chrysler's argument: that § 1905 is applicable to the type of disclosure threatened in this case, and that it affords Chrysler a private right of action to obtain injunctive relief.

A

The Court of Appeals held that § 1905 was not applicable to the agency disclosure at issue here because such disclosure was "authorized by law" within the meaning of the Act. The court found the source of that authorization to be the OFCCP regulations that DLA relied on in deciding to disclose information on the Hamtramck and Newark plants. Chrysler contends here that these agency regulations are not "law" within the meaning of § 1905.

It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the "force and effect of law." This doctrine is so well established that agency regulations implementing federal statutes have been held to pre-empt state law under the Supremacy Clause. . . .

. . . .

In order for a regulation to have the "force and effect of law," it must have certain substantive characteristics and be the product of certain procedural requisites. The central distinction among agency regulations found in the Administrative Procedure Act (APA) is that between "substantive rules" on the one hand and "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" on the other. A "substantive rule" is not defined in the APA, and other authoritative sources essentially offer definitions by negative inference. But in Morton v. Ruiz, 415 U.S. 199 (1974),

we noted a characteristic inherent in the concept of a "substantive rule." We described a substantive rule--or a "legislative-type rule," id., at 236--as one "affecting individual rights and obligations." Id., at 232. This characteristic is an important touchstone for distinguishing those rules that may be "binding" or have the "force of law." Id., at 235, 236.

That an agency regulation is "substantive," however, does not by itself give it the "force and effect of law." The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes. As this Court noted in Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977):

> "Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission. . . . Such rules have the force and effect of law.'"

Likewise the promulgation of these regulations must conform with any procedural requirements imposed by Congress. Morton v. Ruiz, supra, at 232. For agency discretion is not only limited by substantive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969). The pertinent procedural limitations in this case are those found in the APA.

The regulations relied on by the Government in this case as providing "authoriz[ation] by law" within the meaning of § 1905 certainly affect individual rights and obligations; they govern the public's right to information in records obtained under Executive Order 11246 and the confidentiality rights of those who submit information to OFCCP and its compliance agencies. It is a much closer question, however, whether they are the product of a congressional grant of legislative authority.

. . . .

[The court went on to reject Government arguments that its disclosure regulations had the force and effect of law by virtue of Executive Order 11246 or 5 U.S.C. § 301, the "housekeeping statute."]

> There is also a procedural defect in the OFCCP disclosure regulations which precludes courts from affording them the force and effect of law. The defect is a lack of strict compliance with the APA. Recently we have had

occasion to examine the requirements of the APA in the context of "legislative" or "substantive" rulemaking. In Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), we held that courts could only in "extraordinary circumstances" impose procedural requirements on an agency beyond those specified in the APA. It is within an agency's discretion to afford parties more procedure, but it is not the province of the courts to do so. In Vermont Yankee we recognized that the APA is " 'a formula upon which opposing social interests and political forces have come to rest.'" Id., at 547 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950)). Courts upset that balance when they override informed choice of procedures and impose obligations not required by the APA. By the same token courts are charged with maintaining the balance: ensuring that agencies comply with the "outline of minimum essential rights and procedures" set out in the APA. H.R. Rep. No. 1980, 79th Cong., 2d Sess., 16 (1946); see Vermont Yankee Nuclear Power Corp., supra, at 549 n.21. Certainly regulations subject to the APA cannot be afforded the "force and effect of law" if not promulgated pursuant to the statutory procedural minimum found in that Act.

Section 4 of the APA, 5 U.S.C. § 553, specifies that an agency shall afford interested persons general notice of proposed rulemaking and an opportunity to comment before a substantive rule is promulgated. "Interpretive rules, general statements of policy or rules of agency organization, procedure or practice" are exempt from these requirements. When the Secretary of Labor published the regulations pertinent in this case, he stated:

> As the changes made by this document relate solely to interpretive rules, general statements of policy, and to rules of agency procedure and practice, neither notice of proposed rule making nor public participation therein is required by 5 U.S.C. § 553. Since the changes made by this document either relieve restrictions or are interpretative rules, no delay in effective date is required by 5 U.S.C. § 553(d). These rules shall therefore be effective immediately.
>
> In accordance with the spirit of the public policy set forth in 5 U.S.C. § 553, interested persons may submit written comments, suggestions, data, or arguments to the Director, Office of Federal Contract Compliance. . . . 38 Fed. Reg. 3192, 3193 (1973).

Thus the regulations were essentially treated as interpretative rules and interested parties were not afforded the notice of proposed rulemaking required for substantive rules under 5 U.S.C. § 553(b). As we observed in Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977), "a court is not required to give effect to

an interpretative regulation. Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position, and the nature of its expertise." We need not decide whether these regulations are properly characterized "interpretative rules." It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law. An interpretative regulation or general statement of agency policy cannot be the "authoriz[ation] by law" required by § 1905.

. . . .

B

We reject, however, Chrysler's contention that the Trade Secrets Act affords a private right of action to enjoin disclosure in violation of the statute. In Cort v. Ash, 422 U.S. 66 (1975), we noted that this Court has rarely implied a private right of action under a criminal statute and where it has done so "there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone." Nothing in § 1905 prompts such an inference. Nor are other pertinent circumstances outlined in Cort present here. As our review of the legislative history of § 1905--or lack of same--might suggest, there is no indication of legislative intent to create a private right of action. Most importantly, a private right of action under § 1905 is not "necessary to make effective the congressional purpose," J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964), for we find that review of DLA's decision to disclose Chrysler's employment data is available under the APA.

IV

Both Chrysler and the Government agree that there is APA review of DLA's decision. They disagree on the proper scope of review. Chrysler argues that there should be de novo review, while the Government contends that such review is only available in extraordinary cases and this is not such a case.

The pertinent provisions of § 10(c) of the APA, 5 U.S.C. § 706 (1976), provide that a reviewing court shall

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> . . . .

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

For the reasons previously stated, we believe any disclosure that violates § 1905 is "not in accordance with law" within the meaning of 5 U.S.C. § 706(2)(A). De novo review by the District Court is ordinarily not necessary to decide whether a contemplated disclosure runs afoul of § 1905. The District Court in this case concluded that disclosure of some of Chrysler's documents was barred by § 1905, but the Court of Appeals did not reach the issue. We shall therefore vacate the Court of Appeals' judgment and remand for further proceedings consistent with this opinion in order that the Court of Appeals may consider whether the contemplated disclosures would violate the prohibition of § 1905.[49] Since the decision regarding this substantive issue--the scope of § 1905--will necessarily have some effect on the proper form of judicial review pursuant to § 706(2), we think it unnecessary, and therefore unwise, at the present stage of this case for us to express any additional views on that issue.

Vacated and remanded.

MR. JUSTICE MARSHALL, concurring.

I agree that respondents' proposed disclosure of information is not "authorized by law" within the meaning of 18 U.S.C. § 1905, and I therefore join the opinion of the Court. Because the number and complexity of the issues presented by this case will inevitably tend to obscure the dispositive conclusions, I wish to emphasize the essential basis for the decision today.

This case does not require us to determine whether, absent a congressional directive, federal agencies may reveal information obtained during the exercise of their functions. For whatever inherent power an agency

---

[49] Since the Court of Appeals assumed for purposes of argument that the material in question was within an exemption to the FOIA, that court found it unnecessary expressly to decide that issue and it is open on remand. We, of course, do not here attempt to determine the relative ambits of Exemption 4 and § 1905, or to determine whether § 1905 is an exempting statute within the terms of the amended Exemption 3, 5 U.S.C. § 552(b)(3) (1976). Although there is a theoretical possibility that material might be outside Exemption 4 yet within the substantive provisions of § 1905, and that therefore the FOIA might provide the necessary "author[ization] by law" for purposes of § 1905, that possibility is at most of limited practical significance in view of the similarity of language between Exemption 4 and the substantive provisions of § 1905.

has in this regard, § 1905 forbids agencies from divulging certain types of information unless disclosure is independently "authorized by law." Thus, the controlling issue in this case is whether the OFCCP disclosure regulations, 41 CFR "60.40-1 to 60.40-4 (1978), provide the requisite degree of authorization for the agency's proposed release. The Court holds that they do not, because the regulations are not sanctioned directly or indirectly by federal legislation. In imposing the authorization requirement of § 1905, Congress obviously meant to allow only those disclosures contemplated by congressional action. Ante, at 17-28. Otherwise the agencies Congress intended to control could create their own exceptions to § 1905 simply by promulgating valid disclosure regulations. Finally, the Court holds that since § 10(c) of the Administrative Procedure Act requires agency action to be "in accordance with law," 5 U.S.C. § 706(2)(A), a reviewing court can prevent any disclosure that would violate § 1905.

Our conclusion that disclosure pursuant to the OFCCP regulations is not "authorized by law" for purposes of § 1905, however, does not mean the regulations themselves are "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" for purposes of the Administrative Procedure Act. 5 U.S.C. § 706(2)(C). As the Court recognizes ante, at 25 n.40, that inquiry involves very different considerations than those presented in the instant case. Accordingly, we do not question the general validity of these OFCCP regulations or any other regulations promulgated under § 201 of Executive Order 11246. Nor do we consider whether such an Executive order must be founded on a legislative enactment. The Court's holding is only that the OFCCP regulations in issue here do not "authorize" disclosure within the meaning of § 1905.

Based on this understanding, I join the opinion of the Court.

---

d. DOD Regulation 5400-7.R, para 3-200, adopts the National Parks test. However, the D.C. Circuit, sitting en banc, later established an additional basis for protecting information under Exemption 4 in Critical Mass Energy Project v. NRC, 975 F.2d 871 (D.C. Cir. 1992). Although the court in Critical Mass reaffirmed National Parks, it specifically limited its application to information which is "required" by the government to be submitted. Most significantly, it established "categorical" protection for information submitted on a "voluntary" basis, if the information "would customarily not be released to the public" by the submitter. By memorandum dated 23 Mar 1993, Ref: 93-CORR-037, the Office of the Assistant Secretary of Defense (Public Affairs) issued interim guidance on the application of Critical Mass. That office finalized its guidance by memorandum dated 17 Jul 1993, Ref: 93-CORR-094. It provides in pertinent part:

(1) Submitted information is "required" when it is submitted in accordance with an exercised authority for submission; examples include statutes, executive orders, regulations (such as the Federal Acquisition Regulation (FAR)), invitations for bids, requests for proposals, or contracts.

(2) When bids or proposals are incorporated into a contract, they do not lose their "required" submission nature.

(3) If the information was voluntarily submitted, then determine whether the submitter customarily releases it to the public. If the submitter's practice is uncertain, the submitter should be asked to describe its disclosure practices.

(4) With respect to unit prices, except in unusual circumstances, continue to release for successful offerors in accordance with the FAR. See, DoD Policy, dated March 3, 2000, Ref. 00-CORR-025. See also, FAR, 48 C.F.R. §§ 15.503(b)(iv), 15.506(d)(2) (requiring disclosure of unit prices at post award debriefing, in government contracts solicited after 1 January 1998). But see, McDonnell Douglas Corp. v. NASA, 180 F.3d 303 (D.C. Cir. 1999) (expanding "competitive harm" to include unit prices based on "ratcheting down" theory).

(5) Note Statutory Change to Memorandum guidance. Unit prices (as well as other items in an unsuccessful proposal) of unsuccessful offerors are not releasable. 10 U.S.C. § 2305(g)(2) or 41 U.S.C. § 253b(m)(2). The original (and now out-of-date) guidance provided that with unsuccessful offerors, "unit prices are normally releasable unless a National Parks analysis permits withholding."

(6) Option prices are to be treated as unit prices.

Note 1. When a request is received for business information that was required to be submitted, how does the Government know whether the source of the information considers it to be confidential commercial or financial business information? Executive Order 12,600, 52 Fed. Reg. 23781 (1987) and DOD Regulation 5400.7-R, para. 5-207, requires that the submitter of the business information be notified and given an opportunity to present arguments before the agency decides to release or withhold the requested information. Must the agency hold a formal hearing to consider the claims of the submitter before making its decision? The court in CNA Financial Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), held that the "paper hearing" offered was sufficient. The court determined that a full evidentiary hearing was not needed and recognized the tremendous burden such a hearing would place on the agency. Accord, NOW v. Social Security Administration, 736 F.2d 727 (D.C. Cir. 1984).

Note 2. A basic principle of the Freedom of Information Act confirmed by the Chrysler opinion is that the exemptions permit but do not compel withholding. Do agency employees risk violation of 18 U.S.C. § 1905 by release of exempt information? CNA

Financial Corporation v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987), held that 18 U.S.C. § 1905 is at least coextensive with Exemption 4, and that in absence of a regulation effective to authorize disclosure, the Trade Secrets Act prohibits agency release of information that falls within Exemption 4. The policy of the Criminal Division, U.S. Department of Justice, is "not to prosecute government employees for a violation of 18 U.S.C. § 1905 if the release of information in question was made in a good faith effort to comply with the Freedom of Information Act and the appropriate applicable regulations." See United States Attorneys' Manual, § 9-2.025.

Note 3. In Chrysler, the Supreme Court held that an agency's contemplated disclosure of information in violation of 18 U.S.C. § 1905 was reviewable under the Administrative Procedure Act. An adequate administrative record must be developed to support the agency's decision. See Exeutive Order 12,600, 3 C.F.R. § 235 (1988) (applicable to all executive branch departments and agencies), reprinted in 5 U.S.C. § 552 note (1994). See also General Electric Co. v. NRC, 750 F.2d 1394 (7th Cir. 1984) (a single sentence determination which did not address any of the submitter's contentions held inadequate).

Note 4. Although the Court in the Chrysler opinion did not define the scope of 18 U.S.C. § 1905 or Exemption 4, the Court held that certain agency regulations can permit disclosure of information protected by § 1905. To have the force of law, the Court held that the regulation must satisfy three requirements. First, it must be substantive in nature; it must affect individual rights and obligations. Second, it must have been promulgated in compliance with applicable procedural requirements. Finally, Congress must have clearly delegated its legislative powers to make disclosure regulations. Do military disclosure regulations satisfy these standards?

Federal Acquisition Regulation (FAR) 5.303, 48 C.F.R. § 205.303, which provides for the public disclosure of unit prices in contract actions over $5 million, was held to satisfy Chrysler's requirements. In so holding, the district court ruled that the legislative authority for the FAR is the Office of Federal Procurement Policy (OFPP) Act of 1974 under which Congress gave OFPP broad authority to establish regulations to govern government procurement. This statutory grant of authority was held to include "within its broad mandate the ability to promulgate regulations regarding public disclosure of exercised options." On appeal, however, in a rather opaque and confusing decision, the D.C. Circuit remanded the matter back to the agency to determine whether the unit prices were covered by the Trade Secrets Act and for further development of the agency record. McDonnell Douglas Corp. v. Widnall, 57 F.3d 1162 (D.C. Cir. 1995).

e. Exemptions 8 and 9, pertaining to reports of financial institutions and geological data concerning wells, respectively, have resulted in little litigation and are of minimal interest to the military departments. Both are designed to protect specific commercial interests.

2.5 Exemption 5: Internal Agency Communications.

a. This exemption incorporates into FOIA certain discovery privileges which the Government has traditionally enjoyed in litigation. Two privileges recognized by the courts are the attorney-client privilege and the attorney-work product privilege.

Mead Data Central, Inc. v.
United States Department of the Air Force,
566 F.2d 242 (D.C. Cir. 1977)
[Most footnotes omitted.]

Opinion for the court filed by TAMM, Circuit Judge.

Dissenting opinion filed by McGOWAN, Circuit Judge.

TAMM, Circuit Judge:

Mead Data Central, Inc. appeals from a judgment of the United States District Court for the District of Columbia, 402 F. Supp. 460, holding that seven documents relating to a licensing agreement between the United States Department of the Air Force and West Publishing Co. need not be disclosed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1970 & Supp. V. 1975), because they fall within exemption five of the FOIA. While we agree with the district court that the attorney-client privilege and the deliberative process privilege are essential ingredients of exemption five, we find that both the Air Force and the district court applied interpretations of the scope of those privileges that are impermissibly broad, and accordingly remand the case to the district court for further consideration under the narrower constructions set forth in this opinion. We also hold that the Air Force did not adequately justify its claim that there was no non-exempt information which was reasonably segregable, and direct that agency segregability decisions be accompanied by adequate descriptions of the documents' content and articulate the reasons behind the agency's conclusion.

I. BACKGROUND

In early 1975, Mead Data filed a FOIA request with the Air Force seeking disclosure of several categories of documents dealing generally with the Department's "Project FLITE," a computerized legal research system. The Air Force agreed to disclose some of the requested documents, but the Chief of the General Litigation Division of the Office of The Judge Advocate General advised Mead Data by letter that eight of the documents would be withheld. He provided a very brief description of each document and asserted that "[t]he foregoing are exempt from disclosure under . . . 5 U.S.C. § 552(b)(5), as

attorney work products or intra-agency memoranda." Mead Data appealed this decision to the Office of the Secretary and was informed that, although one of the eight documents would be disclosed, the remaining seven would not. The Air Force characterized three of these seven documents as legal opinions of Air Force attorneys advising their client as to applicable law and recommending courses of action with respect to Project FLITE. The other four were described as internal memoranda prepared by Air Force employees, which reflect the course of negotiations between the Air Force and West Publishing Co. for a licensing agreement to use the copyrighted West key number system and offer recommendations as to negotiating positions. The Air Force claimed that the legal opinions fell within the attorney-client privilege incorporated into exemption five of the FOIA, and that the internal memoranda were also covered by that exemption because their disclosure would adversely affect the decisional process within the Air Force by inhibiting the expression of candid opinions.

Mead Data filed suit in the United States District Court for the District of Columbia seeking an injunction to compel the disclosure of the withheld documents. During the court proceedings the Air Force submitted two affidavits offering more detailed descriptions of the contents of the documents and the bases for nondisclosure. . . .

. . . .

The parties filed cross-motions for summary judgment, and following an in camera inspection of the seven documents, the district court entered a judgment in favor of the Air Force. The court noted that although the Air Force's initial description of the withheld documents hardly comported with the requirements of Vaughn v. Rosen and Cuneo v. Schlesinger, the elaborated description contained in the affidavits it had submitted to the court was adequate. On the merits, the court held that documents 1, 4, and 5 fall within the attorney-client privilege of exemption five and that documents 2, 3, 6, and 7 fit squarely within the same exemption because they reflect ongoing developments in a government negotiating process and discuss obstacles, alternatives, and recommendations as the agency progresses toward a final decision. Finally, the court stated that on the basis of its examination of the documents there is no factual or other non-exempt material which can be segregated and disclosed, and that disclosure of these documents would be harmful to future deliberations and contract negotiations.

II. PROCEDURAL REQUIREMENTS

The dispute between the parties in this case over whether the information sought by Mead Data is within exemption five of the FOIA centers

basically around the question of how that information ought to be characterized. Mead Data contends that the information is purely factual and that consequently its disclosure would not adversely affect the Air Force's deliberative process. The Air Force argues to the contrary and insists that the documents withheld consist of advisory opinions, recommendations, and other deliberative material that fall squarely within exemption five.

Where there is such a factual dispute over the nature of the information sought in a FOIA suit, the lack of access of the party seeking disclosure undercuts the traditional adversarial theory of judicial dispute resolution. Vaughn v. Rosen (Vaughn I), 484 F.2d 820, 824-25 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). Although in camera inspection of the disputed documents may compensate somewhat for this deficiency, it is a far from perfect substitute. Moreover, as this court held in Vaughn I, supra at 824, the burden which the FOIA specifically places on the Government to show that the information withheld is exempt from disclosure cannot be satisfied by the sweeping and conclusory citation of an exemption plus submission of disputed material for in camera inspection. Id. at 825-26. Thus, we require that when an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply. . . .

. . . .

III. EXEMPTION FIVE CLAIMS

Exemption five of the FOIA exempts from mandatory disclosure those matters that are "intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (1970). Although Congress clearly intended to refer the courts to discovery principles for the resolution of exemption five disputes, the situations are not identical, and the Supreme Court has recognized that discovery rules should be applied to FOIA cases only "by way of rough analogies." Accepting this "rough analogy" rule as a guiding principle and bearing in mind that FOIA exemptions should be narrowly construed, we turn to the particular documents at issue.

A. Legal Opinions

The district court held that exemption five permitted the Air Force to withhold documents 1, 4, and 5 because they contained information which qualifies for protection under the attorney-client privilege--confidential communications between an attorney and his client relating to a legal matter for

which the client has sought professional advice. We agree that the attorney-client privilege has a proper role to play in exemption five cases. The policy objective of that privilege is certainly consistent with the policy objective of the exemption. Exemption five is intended to protect the quality of agency decision-making by preventing the disclosure requirement of the FOIA from cutting off the flow of information to agency decision-makers. Certainly this covers professional advice on legal questions which bears on those decisions. The opinion of even the finest attorney, however, is no better than the information which his client provides. In order to ensure that a client receives the best possible legal advice, based on a full and frank discussion with his attorney, the attorney-client privilege assures him that confidential communications to his attorney will not be disclosed without his consent. We see no reason why this same protection should not be extended to an agency's communications with its attorneys under exemption five.

. . . .

The Air Force's description of documents 1, 4, and 5 adequately demonstrates that the information in those documents was communicated to or by an attorney as part of a professional relationship in order to provide the Air Force with advice on the legal ramifications of its actions. To that extent it satisfies most of the necessary conditions for application of the attorney-client privilege. The privilege does not allow the withholding of documents simply because they are the product of an attorney-client relationship, however. It must also be demonstrated that the information is confidential. If the information has been or is later shared with third parties, the privilege does not apply.[24]

The description of documents 1 and 5 gives no indication as to the confidentiality of the information on which they are based. It simply states the subject, source, and recipient of the legal opinion rendered. In the federal courts the attorney-client privilege does extend to a confidential communication from an attorney to a client, but only if that communication is based on confidential information provided by the client. The Air Force has not shown that the information on which the legal opinions in documents 1 and

---

[24] . . The fact that the communication at issue in this case may have been circulated among more than one employee of the Air Force does not necessarily destroy their confidentiality, however. Where the client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication.

5 were based meets this confidentiality requirement, and since the FOIA places the burden on the Government to prove the applicability of a claimed privilege, the court could not assume that it was confidential. We therefore reverse the district court's judgment that documents 1 and 5 are covered by the attorney-client privilege component of exemption five. On remand, the court should order disclosure of these documents unless the Air Force demonstrates either that the attorney-client privilege does apply to these documents because the information on which they are based was supplied by the Air Force with the expectation of secrecy and was not known by or disclosed to any third party, or that they fall within exemption five for some other reason.[28]

. . . .

B. Internal Memoranda

The district court decided that the remaining documents, documents 2, 3, 6, and 7, fit squarely within exemption five since "each reflects ongoing developments in a Government negotiating process" as documents wherein "[a]dvice, obstacles, alternatives, and recommendations are weighed and balanced."

It generally has been accepted that exemption five incorporates the governmental privilege, developed in discovery cases, to protect documents containing advisory opinions and recommendations or reflecting deliberations comprising the process by which government policy is formulated. Under this

---

[28] With respect to documents containing legal opinions and advice, there is no doubt a great deal of overlap between the attorney-client privilege component of exemption five and its deliberative process privilege component. The distinction between the two is that the attorney-client privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts, while the deliberative process privilege directly protects advice and opinions and does not permit the nondisclosure of underlying facts unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process. On remand the district court may well conclude that, although these documents are not exempt by the attorney-client privilege, they are nonetheless still free from mandatory disclosure under the deliberative process privilege. Such a result will be more than a mere switch in rationales without substantive impact. If these documents are exempt only because of the deliberative process privilege, the district court must require the Air Force to describe the factual content of the documents and disclose it or provide an adequate justification for concluding that it is not segregable from the exempt portions of the documents.

facet of exemption five, the courts have required disclosure of essentially factual material but allowed agencies to withhold documents which reveal their deliberative or policy-making processes. The Supreme Court approved this approach in EPA v. Mink and found it consistent with the discussion of a "factual-deliberative" distinction in the legislative history of exemption five.

Congress adopted exemption five in recognition of the merits of arguments from the executive branch that the quality of administrative decision-making would be seriously undermined if agencies were forced to "operate in a fishbowl" because the full and frank exchange of ideas on legal or policy matters would be impossible. A decision that certain information falls within exemption five should therefore rest fundamentally on the conclusion that, unless protected from public disclosure, information of that type would not flow freely within the agency.

Many exemption five disputes may be able to be decided by application of the simple test that factual material must be disclosed but advisory material, containing opinions and recommendations, may be withheld. The test offers a quick, clear, and predictable rule of decision, but courts must be careful not to become victims of their own semantics. Exemption five is intended to protect the deliberative process of government and not just deliberative material. Montrose Chemical Corp. v. Train, 160 U.S.App.D.C. 270, 275-278, 491 F.2d 63, 68-71 (1974). Perhaps in the great majority of cases that purpose is well served by focusing on the nature of the information sought. In some circumstances, however, the disclosure of even purely factual material may so expose the deliberative process within an agency that it must be deemed exempted by section 552(b)(5). See Brockway v. Department of the Air Force, 518 F.2d 1184, 1194 (8th Cir. 1975); Montrose Chemical Corp., supra; Amway Corp. v. FTC, 1976-1 Trade Cas. & 60,798, at 68,445 (D.D.C. 1976); Mobil Oil Corp. v. FTC, 406 F. Supp. 305, 315 (S.D.N.Y. 1976). See also Kent Corp. v. NLRB, 530 F.2d 612, 620 (5th Cir.), cert. denied, 429 U.S. 920, 97 S.Ct. 316, 50 L. Ed. 2d 287 (1976).

Mead Data argues that documents 6 and 7 are "reportorial and factual in nature rather than policy deliberative," Brief for Appellant at 21, because they only provide summaries of discussions among Air Force staff relating to the negotiating positions of the Department and West Publishing Co. and do not affirmatively make recommendations or offer opinions. Discussions among agency personnel about the relative merits of various positions which might be adopted in contract negotiations are as much a part of the deliberative process as the actual recommendations and advice which are agreed upon. As such they are equally protected from disclosure by exemption five. See Ash Grove Cement Co. v. FTC, 519 F.2d 934, 935 (D.C. Cir. 1975). It would exalt form over substance to exempt documents in which staff recommend certain action

or offer their opinions on given issues but require disclosure of documents which only "report" what those recommendation and opinions are. The evaluations, opinions, and recommendations reported in documents 6 and 7 are the raw materials which went into the decision of the Air Force to contract with West Publishing Co. on certain terms. This is not a case like Scwartz v. IRS or Sterling Drug Inc. v. FTC where an agency is attempting to invoke exemption five to protect the private transmittal of binding agency opinions and interpretations. The policy of promoting the free flow of ideas within an agency by guaranteeing protection from disclosure is therefore fully applicable to this information, and we hold that to the extent documents 6 and 7 reflect the views and opinions of Air Force staff on the state of negotiations between the Air Force and West Publishing--the potential problems and available alternatives--they are exempt from disclosure under the FOIA by section 552(b)(5).

Document 3 consists entirely of a running summary of the offers and counter-offers made by each side in the Air Force's negotiations with West Publishing Co. The Air Force insists that this information is exempt simply because it reflects negotiating positions of the parties which predate the final agreement on the contract terms. The district court apparently accepted this proposition, for in holding that documents 2, 3, 6, and 7 fit "squarely" within exemption five, it reasoned that "[e]ach document reflects ongoing developments in a Government negotiating process." We find this to be an entirely too broad reading of exemption five. Predecisional materials are not exempt merely because they are predecisional; they must also be a part of the deliberative process within a government agency. Vaughn v. Rosen (Vaughn II), 523 F.2d 1136, 1144 (D.C. Cir. 1975). The documents in this case which would reveal the Air Force's internal self-evaluation of its contract negotiations, including discussion of the merits of past efforts, alternatives currently available, and recommendations as to future strategy, fall clearly within the test. Information about the "deliberative" or negotiating process outside an agency, between itself and an outside party, does not. Moreover, neither of the policy objectives which exemption five is designed to serve--avoiding premature disclosure of agency decisions and encouraging the free exchange of ideas among administrative personnel--is relevant to a claim of secrecy for a proceeding between an agency and an outside party. All of the information as to what the Air Force offered West Publishing, initially and in response to West's counteroffers, has already been fully disclosed to at least one party outside the Department--West itself--and the Department has no control over further disclosure.

Perhaps it could be shown that the threat of disclosure of negotiation proceedings would so inhibit private parties from dealing with the Government that agencies must be permitted to withhold such information in order to

> preserve their ability to effectively arrange for contractual agreements. Cf. Brockway, supra, 518 F.2d at 1193; Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963). Arguments that the disclosure mandated by the FOIA would seriously hamper the performance of an agency's other duties have not fared well in the courts, however. An agency cannot meet its statutory burden of justification by conclusory allegations of possible harm. It must show by specific and detailed proof that disclosure would defeat, rather than further, the purposes of the FOIA. See Brockway, supra, 518 F.2d at 1194.
>
> Whatever might be shown with respect to the harm caused by disclosure of the offers and counter-offers made during negotiation of a government contract, the justification claimed by the Air Force in this case is far from sufficient. Unless far more compelling reasons are brought forth on remand and supported by adequately detailed proof, the district court will have no option but to compel disclosure of document 3.

[The court went on to address plaintiff's argument that the Government had violated its own regulations by failing to demonstrate that withholding served a significant and legitimate Government purpose. Because this issue was beyond the purview of the Freedom of Information Act, the court's review was limited to determining whether the Air Force's action amounted to an abuse of discretion.

The court also discussed the issue of segregability of non-exempt portions of the records in question and concluded as follows:]

> Requiring a detailed justification for an agency decision that non-exempt material is not segregable will not only cause the agency to reflect on the need for secrecy and improve the adversarial position of FOIA plaintiffs, but it will also enable the courts to conduct their review on an open record and avoid routine reliance on in camera inspection. It is neither consistent with the FOIA nor a wise use of increasingly burdened judicial resources to rely on in camera review of documents as the principal tool for review of segregability disputes. See Vaughn I, supra, 484 F.2d at 825-26. In Weissman v. CIA, we held that neither the legislative history of the statutory segregability requirement nor the court decisions it endorsed require the courts to conduct an in camera line-by-line analysis of withheld documents whenever a FOIA plaintiff claims that there may be non-exempt material which was reasonably segregable but not disclosed. 565 F.2d 692 at 697-698 (D.C. Cir. 1977). If an agency has provided the description and justification suggested by this opinion, a district court need not conduct its own in camera search for segregable non-exempt information unless the agency response is vague, its claims too sweeping, or there is a reason to suspect bad faith. Id. at 698.

VI. CONCLUSION

> The district court's judgment that exemption five of the FOIA permits the Air Force to withhold all of the material in the seven documents at issue in this case rests on an impermissibly broad interpretation of the attorney-client privilege and the deliberative process privilege. We therefore remand the case for further proceedings under the narrower constructions outlined above and direct that the segregability inquiry be augmented by a more detailed justification of the Air Force's decision, accompanied by an indication of the proportion of the material which is non-exempt and how it is distributed throughout the documents.
> Remanded.

Note 1. In order to qualify as attorney work-product, a document must be "prepared in anticipation of litigation." Fed. R. Civ. Pro. 26(b)(3). Because the privilege covers all documents prepared in anticipation of litigation, there is no requirement that factual material be disclosed. Norwood v. FAA, 993 F.2d 570 (6th Cir. 1993); Nadler v. United States Dep't of Justice, 955 F.2d 1479 (11th Cir. 1992); Martin v. Office of Special Counsel, 819 F.2d 1181 (D.C. Cir. 1987). Cf. FTC v. Grolier, Inc., 462 U.S. 19 (1983) (Brennan, J., concurring) ("[N]othing in either FOIA or our decisions interpreting it authorizes us to define the coverage of the work product doctrine under Exemption 5 differently from the definition of its coverage that would obtain under Rule 26(b)(3)."). In Grolier, the Supreme Court held that attorney work-product materials are entitled to perpetual Exemption 5 protection.

Note 2. The attorney work product privilege is not limited to civil litigation, but extends to administrative proceedings. See Martin v. Office of Special Counsel, 819, F.2d 1181 (D.D.C. 1987), and to criminal matters as well, see Antonelli v. Sullivan, 732 F.2d 560, 561 (7th Cir. 1983).

b. Exemption 5 has been the subject of a good deal of Supreme Court consideration and many of the cases have involved the deliberative process privilege. The goal of the deliberative process privilege is to encourage frank and open communication between a subordinate and a superior. The theory behind the privilege is that if the subordinate's advice is revealed he may be reluctant to be candid and frank. Typical deliberative matter includes recommendations, proposals, suggestions, comments and advice. Facts are not normally deliberative and are not protected under this privilege, unless their disclosure would expose the agency's decisionmaking process. See, e.g., Dudman Communications Corp. v. Dep't of the Air Force, 815 F.2d 1565 (D.C. Cir. 1987) (protecting factual draft of history on grounds that comparing it to final official history would reveal editorial judgments). In some cases, it is difficult to determine whether particular information is factual or evaluative. See, e.g., Quarles v. Dep't of the Navy, 893 F.2d 390 (D.C. Cir. 1990) (protecting construction cost estimates which court characterized as "elastic facts").

Requests for agency records are a type of access authorized under section (a)(3) of the Freedom of Information Act. Sometimes requesters assert that agencies have an affirmative duty to make agency records available either under sections (a)(1) or (a)(2) of the Act. The relationship between "final opinions" under section (a)(2) and Exemption 5 was resolved by the Supreme Court in the case of NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). The Court also addressed the extent to which Exemption 5 shields memoranda claimed to be part of the deliberative process.

National Labor Relations Board v.
Sears, Roebuck & Co.
421 U.S. 132 (1975)
[Most footnotes omitted.]

MR. JUSTICE WHITE delivered the opinion of the Court.

The National Labor Relations Board (the Board) and its General Counsel seek to set aside an order of the United States District Court directing disclosure to respondent, Sears, Roebuck & Co. (Sears), pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (Act), of certain memoranda, known as "Advice Memoranda" and "Appeals Memoranda," and related documents generated by the Office of the General Counsel in the course of deciding whether or not to permit the filing with the Board of unfair labor practice complaints.

. . . .

Sears claims, and the courts below ruled, that the memoranda sought are expressions of legal and policy decisions already adopted by the agency and constitute "final opinions" and "instructions to staff that affect a member of the public," both categories being expressly disclosable under § 552(a)(2) of the Act, pursuant to its purposes to prevent the creation of "secret law." In any event, Sears claims, the memoranda are nonexempt "identifiable records" which must be disclosed under § 552(a)(3). The General Counsel, on the other hand, claims that the memoranda sought here are not final opinions under § 552(a)(2) and that even if they are "identifiable records" otherwise disclosable under § 552(a)(3), they are exempt under § 552(b), principally as "intra-agency" communications under § 552(b)(5) (Exemption 5), made in the course of formulating agency decisions on legal and policy matters.

. . . .

III

It is clear, and the General Counsel concedes, that Appeals and Advice Memoranda are at the least "identifiable records" which must be disclosed on demand, unless they fall within one of the Act's exempt categories. It is also clear that, if the Memoranda do fall within one of the Act's exempt categories, our inquiry is at an end for the Act "does not apply" to such documents. Thus our inquiry, strictly speaking, must be into the scope of the exemptions which the General Counsel claims to be applicable -- principally Exemption 5 relating to "intra-agency memoranda." The General Counsel also concedes, however, and we hold for the reasons set forth below, that Exemption 5 does not apply to any document which falls within the meaning of the phrase "final opinion . . . made in the adjudication of cases." 5 USC § 552(a)(2)(A). The General Counsel argues, therefore, as he must, that no Advice or Appeals Memorandum is a final opinion made in the adjudication of a case and that all are "intra-agency" memoranda within the coverage of Exemption 5. He bases this argument in large measure on what he claims to be his lack of adjudicative authority. It is true that the General Counsel lacks any authority finally to adjudicate an unfair labor practice claim in favor of the claimant; but he does possess the authority to adjudicate such a claim against the claimant through his power to decline to file a complaint with the Board. We hold for reasons more fully set forth below that those Advice and Appeals Memoranda which explain decisions by the General Counsel not to file a complaint are "final opinions" made in the adjudication of a case and fall outside the scope of Exemption 5; but that those Advice and Appeals Memoranda which explain decisions by the General Counsel to file a complaint and commence litigation before the Board are not "final opinions" made in the adjudication of a case and do fall within the scope of Exemption 5.

A

. . . The privileges claimed by petitioners to be relevant to this case are (i) the "generally . . . recognized" privilege for "confidential intra-agency advisory opinions . . .," Kaiser Aluminum & Chemical Corp. v. United States, 141 Ct. Cl. 38, 49, 157 F. Supp. 939, 946 (1958) (Reed, J.), disclosure of which "would be "injurious to the consultative functions of government. . . .' Kaiser Aluminum & Chemical Corp., supra, at 49, 157 F. Supp., at 946," EPA v. Mink, supra, at 86-87 (sometimes referred to as "executive privilege"), and (ii) the attorney-client and attorney work-product privileges generally available to all litigants.

(i)

That Congress had the Government's executive privilege specifically in mind in adopting Exemption 5 is clear, S. Rep. No. 813, 9; HR Rep No. 1497, 10; EPA v. Mink, supra, at 86. The precise contours of the privilege in the context of this case are less clear, but may be gleaned from expressions of legislative purpose and the prior case law. The cases uniformly rest the privilege on the policy of protecting the "decision making processes of government agencies," Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 660 (CA6 1972); Carl Zeiss Stiftung v. E. B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.C. 1966), see also EPA v. Mink, supra, at 86-87; International Paper Co. v. FPC, 438 F.2d 1349, 1358-1359 (CA2 1971); Kaiser Aluminum & Chemical Corp. v. United States, supra, at 49, 157 F. Supp., at 946; and focus on documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Carl Zeiss Stiftung v. E. B. Carl Zeiss, Jena, supra, at 324. The point, plainly made in the Senate Report, is that the "frank discussion of legal or policy matters" in writing might be inhibited if the discussion were made public; and that the "decisions" and "policies formulated" would be the poorer as a result. S. Rep. No. 813, 9. See also H.R. Rep. No. 1497, p. 10; EPA v. Mink, supra, at 87. As a lower court has pointed out, "there are enough incentives as it is for playing it safe and listing with the wind," Ackerley v. Ley, 137 U.S. App. D.C. 133, 138, 420 F.2d 1336, 1341 (1969), and as we have said in an analogous context, "[h]uman experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances . . . to the detriment of the decisionmaking process." United States v. Nixon, 418 U.S. 683, 705 (1974) (emphasis added).[17]

Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made. However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached; and therefore equally difficult to see how the quality of the decision will be affected by forced disclosure of such communications, as long as prior communications and the ingredients of the decisionmaking process are not disclosed. Accordingly, the lower courts have uniformly drawn

[17] Our remarks in United States v. Nixon were made in the context of a claim of "executive privilege" resting solely on the Constitution of the United States. No such claim is made here and we do not mean to intimate that any documents involved here are protected by whatever constitutional content the doctrine of executive privilege might have.

a distinction between predecisional communications, which are privileged, e.g., Boeing Airplane Co. v. Coggeshall, 108 U.S. App. D.C. 106, 280 F.2d 654 (1960); O'Keefe v. Boeing Co., 38 F.R.D. 329 (S.D.N.Y. 1965); Walled Lake Door Co. v. United States, 31 F.R.D. 258 (E.D. Mich. 1962); Zacher v. United States, 227 F.2d 219, 226 (CA8 1955), cert. denied, 350 U.S. 993 (1956); Clark v. Pearson, 238 F. Supp. 495, 496 (DC 1965); and communications made after the decision and designed to explain it, which are not.[19] Sterling Drug, Inc. v. FTC, 146 U.S. App. D.C. 237, 450 F.2d 698 (1971); GSA v. Benson, 415 F.2d 878, 881 (CA9 1969); Bannercraft Clothing Co. v. Renegotiation Board, 151 U.S. App. D.C. 174, 466 F.2d 345 (1972), rev'd on other grounds, 415 U.S. 1 (1974); Tennessean Newspapers, Inc. v. FHA, supra. See also S. Rep. No. 1219, 88th Cong., 2d Sess., 7 and 11. This distinction is supported not only by the lesser injury to the decisionmaking process flowing from disclosure of postdecisional communications, but also, in the case of those communications which explain the decision, by the increased public interest in knowing the basis for agency policy already adopted. The public is only marginally concerned with reasons supporting a policy which an agency has rejected, or with reasons which might have supplied, but did not supply, the basis for a policy which was actually adopted on a different ground. In contrast, the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency, constitute the "working law" of the agency and have been held by the lower courts to be outside the protection of Exemption 5. [Citations omitted.] Exemption 5, properly construed, calls for "disclosure of all 'opinions and interpretations' which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking in the process of working out its policy and determining what its law ought to be." Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761, 797 (1967); Note, Freedom of Information Act and the Exemption for Inter-Agency Memoranda, 86 Harv. L. Rev. 1047 (1973).

---

[19] We are aware that the line between predecisional documents and postdecisional documents may not always be a bright one. Indeed, even the prototype of the postdecisional document--the "final opinion"--serves the dual function of explaining the decision just made and providing guides for decisions of similar or analogous cases arising in the future. In its latter function, the opinion is predecisional; and the manner in which it is written may, therefore, affect decisions in later cases. For present purposes it is sufficient to note that final opinions are primarily postdecisional--looking back on and explaining, as they do, a decision already reached or a policy already adopted--and that their disclosure poses a negligible risk of denying to agency decisionmakers the uninhibited advice which is so important to agency decisions.

This conclusion is powerfully supported by the other provisions of the Act. The affirmative portion of the Act, expressly requiring indexing of "final opinions," "statements of policy which have been adopted by the agency," and "instructions to staff that affect a member of the public," 5 U.S.C. § 552(a)(2), represents a strong congressional aversion to "secret [agency] law," Davis, supra, at 797; and represents an affirmative congressional purpose to require disclosure of documents which have "the force and effect of law." H.R. Rep. No. 1497, p. 7. We should be reluctant, therefore, to construe Exemption 5 to apply to the documents described in 5 U.S.C. § 552(a)(2); and with respect at least to "final opinions," which not only invariably explain agency action already taken or an agency decision already made, but also constitute "final dispositions" of matters by an agency . . . we hold that can never apply.

(ii)

It is equally clear that Congress had the attorney's work-product privilege specifically in mind when it adopted Exemption 5 and that such a privilege had been recognized in the civil discovery context by the prior case law. The Senate Report states that Exemption 5 "would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties," S. Rep. No. 813,p. 2; and the case law clearly makes the attorney's work-product rule of Hickman v. Taylor, 329 U.S. 495 (1947), applicable to Government attorneys in litigation. [Citations omitted.] Whatever the outer boundaries of the attorney's work-product rule are, the rule clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy. [Citations omitted.]

B

Applying these principles to the memoranda sought by Sears, it becomes clear that Exemption 5 does not apply to those Appeals and Advice Memoranda which conclude that no complaint should be filed and which have the effect of finally denying relief to the charging party; but that Exemption 5 does protect from disclosure those Appeals and Advice Memoranda which direct the filing of a complaint and the commencement of litigation before the Board.

(i)

Under the procedures employed by the General Counsel, Advice and Appeals Memoranda are communicated to the Regional Director after the General Counsel, through his Advice and Appeals Branches, has decided whether or not to issue a complaint; and represent an explanation to the Regional Director of a legal or policy decision already adopted by the

General Counsel. In the case of decisions not to file a complaint, the memoranda effect as "final" a "disposition," see discussion, infra, at 158-159, as an administrative decision can--representing, as it does, an unreviewable rejection of the charge filed by the private party. Vaca v. Sipes, 386 U.S. 171 (1967). Disclosure of these memoranda would not intrude on predecisional processes, and protecting them would not improve the quality of agency decisions, since when the memoranda are communicated to the Regional Director, the General Counsel has already reached his decision and the Regional Director who receives them has no decision to make--he is bound to dismiss the charge. . . .

. . . .

For essentially the same reasons, these memoranda are "final opinions" made in the "adjudication of cases" which must be indexed pursuant to 5 U.S.C. § 552(a)(2)(A). The decision to dismiss a charge is a decision in a "case" and constitutes an "adjudication". . . .

. . . .

(ii)

Advice and Appeals Memoranda which direct the filing of a complaint, on the other hand, fall within the coverage of Exemption 5. The filing of a complaint does not finally dispose even of the General Counsel's responsibility with respect to the case. The case will be litigated before and decided by the Board; and the General Counsel will have the responsibility of advocating the position of the charging party before the Board. The Memoranda will inexorably contain the General Counsel's theory of the case and may communicate to the Regional Director some litigation strategy or settlement advice. Since the Memoranda will also have been prepared in contemplation of the upcoming litigation, they fall squarely within Exemption 5's protection of an attorney's work product. At the same time, the public's interest in disclosure is substantially reduced by the fact, as pointed out by the ABA Committee, see supra, at 156, that the basis for the General Counsel's legal decision will come out in the course of litigation before the Board; and that the "law" with respect to these cases will ultimately be made not by the General Counsel but by the Board or the courts.

We recognize that an Advice or Appeals Memorandum directing the filing of a complaint--although representing only a decision that a legal issue is sufficiently in doubt to warrant determination by another body--has many of the characteristics of the documents described in 5 U.S.C. § 552(a)(2). Although not a "final opinion" in the "adjudication" of a "case" because it does not effect a "final disposition," the memorandum does explain a decision already reached by the General Counsel which has real operative effect--it permits litigation before the Board; and we have indicated a reluctance to construe Exemption 5

to protect such documents. Supra, at 153. We do so in this case only because the decisionmaker--the General Counsel--must become a litigating party to the case with respect to which he has made his decision. The attorney's work-product policies which Congress clearly incorporated into Exemption 5 thus come into play and lead us to hold that the Advice and Appeals Memoranda directing the filing of a complaint are exempt whether or not they are, as the District Court held, "instructions to staff that affect a member of the public."

C

Petitioners assert that the District Court erred in holding that documents incorporated by reference in nonexempt Advice and Appeals Memoranda lose any exemption they might previously have held as "intra-agency" memoranda. We disagree.

The probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if adopted, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports the District Court's decision below. Thus, we hold that, if an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise be a final opinion, that memorandum may be withheld only on the ground that it falls within the coverage of some exemption other than Exemption 5.

Petitioners also assert that the District Court's order erroneously requires it to produce or create explanatory material in those instances in which an Appeals Memorandum refers to the "circumstances of the case." We agree. The Act does not compel agencies to write opinions in cases in which they would not otherwise be required to do so. It only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create. Sterling Drug, Inc. v. FTC, 146 U.S. App. D.C. 237, 450 F.2d 698 (1971). Thus, insofar as the order of the court below requires the agency to create explanatory material, it is baseless. Nor is the agency required to identify, after the fact, those pre-existing documents which contain the "circumstances of the case" to which the opinion may have referred, and which are not identified by the party seeking disclosure.

. . . .

Note 1. The term "executive privilege" is sometimes used, as the Supreme Court did in its opinion in Sears, to describe the deliberative process. However, the Court carefully distinguished this sense of executive privilege from that having a constitutional basis. See footnote 17. A similar distinction was made by the Court in its opinion in EPA v. Mink, 410 U.S. 73 (1973). In commenting on the classification requirements under Exemption 1 as it then existed, the Court observed, "Congress could certainly have provided that the Executive Branch adopt new procedures--subject only to whatever limitation the Executive privilege may be held to impose upon such congressional ordering. Cf. United States v. Reynolds, 345 U.S. 1 (1953)." Id. at 83.

Exemptions 1 and 5, as well as Exemption 7 (which includes protection for confidential sources), reflect Congress' recognition of the existence of "executive privilege." There is some question as to whether these exemptions are coextensive with that concept, or whether executive privilege is broader than its recognition in the Freedom of Information Act. If it does have a constitutional basis, it may provide authority for the President to direct the withholding of records which are not exempt from release under the Act. See United States v. Nixon, 418 U.S. 683 (1974); Halperin v. Department of State, 565 F.2d 699 (D.C. Cir. 1977); Government Information and the Rights of Citizens, 73 Mich. L. Rev. 971, 1020-22 (1975); Note, The Freedom of Information Act: A Seven-Year Assessment, 74 Colum. L. Rev. 895, 930-943 (1974).

Note 2. In some cases, decisionmaking evolves through several bureaucratic levels. Is the decision of each tier of the process a "final opinion" of the agency? When is a "final opinion" final? This issue was addressed in the companion case to Sears, Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975). See also Bureau of National Affairs, Inc. v. Department of Justice, 742 F.2d 1484, 1497 (D.C. Cir. 1984) (agency recommendations to OMB concerning development of proposed legislation are predecisional).

Note 3. Is a contracting officer's written decision to award a contract a "final opinion" when the unsuccessful bidder files a pre-award protest to the GAO? See Shermco Industries, Inc. v. Secretary of the United States Air Force, 613 F.2d 1314 (5th Cir. 1980) and Audio Technical Service v. Dep't of Army, 487 F. Supp. 779 (D.D.C. 1979).

c. Does Exemption 5 permit delayed disclosure of intra-agency memoranda if immediate release would undermine agency policy? While this argument was rejected by the Supreme Court in the following case, another privilege under Exemption 5 was identified as permitting withholding. A trade secret or commercial information privilege was recognized by the Court for information generated within the Government.

Federal Open Market Committee of the
Federal Reserve System v. Merrill,
443 U.S. 340 (1979)
[Most footnotes omitted.]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Federal Open Market Committee has a practice, authorized by regulation, 12 CFR § 271.5 (1978) of withholding certain monetary policy directives from the public during the month they are in effect. At the end of the month, the directives are published in full in the Federal Register. The United States Court of Appeals for the District of Columbia Circuit held that this practice violates the Freedom of Information Act, 5 U.S.C. § 552. 565 F.2d 778 (1977). We granted certiorari on the strength of the Committee's representations that this ruling could seriously interfere with the implementation of national monetary policy. 436 U.S. 917 (1978).

I

Open market operations--the purchase and sale of government securities in the domestic securities market--are the most important monetary policy instrument of the Federal Reserve System. When the Federal Reserve System buys securities in the open market, the payment is ordinarily credited in the reserve account of the seller's bank, increasing the total volume of bank reserves. When the Federal Reserve System sells securities on the open market, the sales price usually is debited in the reserve account of the buyer's bank, decreasing the total volume of reserves. Changes in the volume of bank reserves affect the ability of banks to make loans and investments. This in turn has a substantial impact on interest rates and investment activity in the economy as a whole.

The Federal Open Market Committee (FOMC or Committee), petitioner herein, by statute has exclusive control over the open market operations of the entire Federal Reserve System. . . .

The FOMC meets approximately once a month to review the overall state of the economy and consider the appropriate course of monetary and open market policy. The Committee's principal conclusions are embodied in a statement called the Domestic Policy Directive. The Directive summarizes the economic and monetary background of the FOMC's deliberations and indicates in general terms whether the Committee wishes to follow an expansionary, deflationary, or unchanged monetary policy in the period ahead. . . .

. . . .

. . . The Domestic Policy Directive . . . exists as a document for approximately one month before it makes its first public appearance as part of the Record of Policy Actions. Moreover, by the time the Domestic Policy Directive is released as part of the Record of Policy Actions, it has been

supplanted by a new Directive and is no longer the current and effective policy of the FOMC.

II

Respondent, when this action was instituted in May 1975, was a law student at Georgetown University Law Center, Washington, D.C. The complaint alleged that he had "developed a strong interest in administrative law and the operation of agencies of the federal government," and had formed a desire to study "the process by which the FOMC regulates the national money supply through the frequent adoption of domestic policy directives."

In pursuit of these professed academic interests, respondent in March 1975, through counsel, filed a request under the Freedom of Information Act (FOIA) seeking the "Records of policy actions taken by the Federal Open Market Committee at its meetings in January 1975 and February 1975, including, but not limited to, instructions to the Manager of the Open Market Account and any other person relating to the purchase and sale of securities and foreign currencies." The FOMC denied the request, explaining that the Records of Policy Actions, including the Domestic Policy Directive, were available only on a delayed basis under the policy set forth in 12 CFR § 271.5. An administrative appeal resulted in release of the requested documents, but only because the withholding period by then had expired. Governor Robert C. Holland of the Federal Reserve Board, on behalf of the Committee, wrote to respondent's counsel that the Committee remained firmly committed to what he described as "a legislative policy against premature disclosures which would impair the effectiveness of the operations of Government agencies."

Respondent then instituted this litigation in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief against the operation of 12 CFR § 271.5 and the policy of delayed disclosure. . . .

. . . .

At issue here is Exemption 5 of the FOIA, which provides that the affirmative disclosure provisions do not apply to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." § 552(b)(5). Exemption 5, in other words, applies to documents that are (a) inter-agency or intra-agency memorandums or letters," and (b) consist of material that "would not be available by law to a party . . . in litigation with the agency."

A

There can be little doubt that the FOMC's Domestic Policy Directives constitute "inter-agency or intra-agency memorandums or letters." FOMC is clearly an "agency" as that term is defined in the Administrative Procedure Act. 5 U.S.C. §§ 551(1), 552(e). And the Domestic Policy Directives are essentially the FOMC's written instructions to the Account Manager, a subordinate official of the agency. These instructions, although possibly of interest to members of the public, are binding only upon the Account Manager. The Directives do not establish rules that govern the adjudication of individual rights, nor do they require particular conduct or forbearance by any member of the public. They are thus "intra-agency memorandums" within the meaning of Exemption 5.

B

Whether the Domestic Policy Directives "would not be available by law to a party . . . in litigation with the agency" presents a more difficult question. The House Report states that Exemption 5 was intended to allow an agency to withhold intra-agency memoranda which would not "routinely be disclosed to a private party through the discovery process in litigation with the agency. . . " H.R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966). EPA v. Mink, 410 U.S. 73, 86-87 (1973), recognized that one class of intra-agency memoranda shielded by Exemption 5 are agency reports and working papers subject to the "executive" privilege for predecisional deliberations. NLRB v. Sears, Roebuck & Co., 321 U.S. 132 (1975), confirmed this interpretation, and further held that Exemption 5 encompasses materials that constitute privileged attorney's work-product. Id., at 154-155.

The FOMC does not contend that the Domestic Policy Directives are protected by either the privilege for predecisional communications or the privilege for attorney's work-product. Its principal argument, instead, is that Exemption 5 confers general authority upon an agency to delay disclosure of intra-agency memoranda that would undermine the effectiveness of the agency's policy if released immediately. This general authority exists, according to the FOMC, even if the memoranda in question could be routinely discovered by a party in civil litigation with the agency.

We must reject this analysis. First, since the FOMC does not indicate that the asserted authority to defer disclosure of intra-agency memoranda rests on a privilege enjoyed by the Government in the civil discovery context, its argument is fundamentally at odds with the plain language of the statute. EPA v. Mink, 410 U.S. 85-86; NLRB v. Sears, Roebuck & Co., 421 U.S., at 149. In addition, the Committee's argument proves too much. Such an interpretation of Exemption 5 would appear to allow an agency to withhold

any memoranda, even those that contain final opinions and statements of policy, whenever the agency concluded that disclosure would not promote the "efficiency" of its operations or otherwise would not be in the "public interest." This would leave little, if anything, to FOIA's requirement of prompt disclosure, and would run counter to Congress' repeated rejection of any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague "public interest" standard. H.R. Rep. No. 1497, supra, at 5, 9; S. Rep. No. 813, supra, at 3, 5, 8; EPA v. Mink, 410 U.S., at 78-80.

The FOMC argues, in the alternative, that there are several civil discovery privileges, in addition to the privileges for predecisional communications and attorney work-product, that would allow a district court to delay discovery of documents such as the Domestic Policy Directives until they are no longer operative. The Committee contends that Exemption 5 incorporates each of these privileges, and that it thus shields the Directives from a requirement of immediate disclosure.

Preliminarily, we note that it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery. See NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 254 n.12 (1978) (Powell, J., concurring in part and dissenting in part). There are, to be sure, statements in our cases construing Exemption 5 that imply as much. See, e.g., Renegotiation Board v. Grumman Aircraft, 421 U.S. 168, 184 (1975) ("Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context."). Heretofore, however, this Court has recognized only two privileges in Exemption 5, and, as NLRB v. Sears, Roebuck & Co., 421 U.S., at 150-154, emphasized, both these privileges are expressly mentioned in the legislative history of that Exemption. Moreover, material that may be subject to some other discovery privilege may also be exempt from disclosure under one of the other eight exemptions of FOIA, particularly Exemptions 1, 4, 6, and 7. We hesitate to construe Exemption 5 to incorporate a civil discovery privilege that would substantially duplicate another exemption. Given that Congress specifically recognized that certain discovery privileges were incorporated into Exemption 5, and dealt with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution.

The most plausible of the three privileges asserted by the FOMC[17] is based on Fed. Rule Civ. Proc. 26(c)(7), which provides that a district court,

[17] The two other privileges advanced by the FOMC are a privilege for "official government information" whose disclosure would be harmful to the public interest, see Machin

"for good cause shown," may order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."[18] The Committee argues that the Domestic Policy Directives constitute "confidential . . . commercial information," at least during the month in which they provide guidance to the Account Manager, and that they therefore would be privileged from civil discovery during this period.

The federal courts have long recognized a qualified evidentiary privilege for trade secrets and other confidential commercial information. See, e.g., E.I. du Pont de Nemours Powder Co. v. Mosland, 244 U.S. 100, 103 (1917). The Federal Rules of Civil Procedure provide similar qualified protection for trade secrets and confidential commercial information in the civil discovery context. Fed. Rule Civ. Proc. 26(c)(7), which replaced former Rule 30(b) in 1970, was intended in this respect to "reflect existing law." Advisory Committee's Notes on Fed. Rule Civ. Proc. 26, 28 U.S.C. App., p. 444. The Federal Rules, of course, are fully applicable to the United States as a party. See, e.g., United States v. Procter & Gamble Co., 356 U.S. 677, 681 (1958); 4 J. Moore's Federal Practice & 26.61[2], p. 26-263. And we see no reason why the Government could not, in an appropriate case, obtain a protective order under Rule 26(c)(7).

To be sure, the House and Senate Reports do not provide the same unequivocal support for an Exemption 5 privilege for "confidential . . .

---

v. Zuchert, 114 U.S. App. D.C. 355, 338, 316 F.2d 336, 339, cert. denied, 375 U.S. 896 (1963), and a privilege based on Fed. Rule Civ. Proc. 26(c)(2), which permits a court to order that discovery "may be had only on specified terms and conditions, including a designation of the time or place." In light of our disposition of this case, we do not consider whether either asserted privilege is incorporated in Exemption 5.

[18] The full text reads:

> "Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way[.]" Fed. Rule Civ. Proc. 26(c)(7).

commercial information" as they do for the executive and attorney work product privileges. Nevertheless, we think that the House Report, when read in conjunction with the hearings conducted by the relevant House and Senate Committees, can fairly be read as authorizing at least a limited form of Exemption 5 protection for "confidential . . . commercial information."

In hearings that preceded the enactment of the FOIA, various agencies complained that the original Senate bill, which did not include the present Exemption 5, failed to provide sufficient protection for confidential commercial information and other information about government business transactions. . . .

After the hearings were completed, Congress amended the provision that ultimately became Exemption 5 to provide for nondisclosure of materials that "would not be available by law to a party . . . in litigation with the agency." The House Report . . . explained that one purpose of the revised Exemption 5 was to protect internal agency deliberations and thereby ensure "full and frank exchange of opinions" within an agency. It then added, significantly:

> Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate secrecy (emphasis added). Ibid.

In light of the complaints registered by the agencies about premature disclosure of information relating to government contracts, we think it is reasonable to infer that the House Report, in referring to "information . . . generated [in] the process of awarding a contract," specifically contemplated a limited privilege for confidential commercial information pertaining to such contracts.

This conclusion is reinforced by consideration of the differences between commercial information generated in the process of awarding a contract, and the type of material protected by executive privilege. The purpose of the privilege for predecisional deliberations is to insure that a decision-maker will receive the unimpeded advice of his associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank. It follows that documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports and expression of opinion within the agency. The theory behind a privilege for confidential commercial information generated in the process of

awarding a contract, however, is not that the flow of advice may be hampered, but that the Government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered. Consequently, the rationale for protecting such information expires as soon as the contract is awarded or the offer withdrawn.

We are further convinced that recognition of an Exemption 5 privilege for confidential commercial information generated in the process of awarding a contract would not substantially duplicate any other FOIA exemption. The closest possibility is Exemption 4, which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). Exemption 4, however, is limited to information "obtained from a person," that is, to information obtained outside the Government. See 5 U.S.C. § 551(2). The privilege for confidential information about Government contracts recognized by the House Report, in contrast, is necessarily confined to information generated by the Federal Government itself.

We accordingly conclude that Exemption 5 incorporates a qualified privilege for confidential commercial information, at least to the extent that this information is generated by the Government itself in the process leading up to awarding a contract.[23]

---

[23] Our conclusion that the Domestic Policy Directives are at least potentially eligible for protection under Exemption 5 does not conflict with the District Court's finding that the Directives are "statements of general policy . . . formulated and adopted by the agency," which must be "currently published" in the Federal Register pursuant to 5 U.S.C. § 552(a)(1). 413 F. Supp., at 504-505. It is true that in NLRB v. Sears, Roebuck & Co., supra, we noted that there is an obvious relationship between Exemption 5, and the affirmative portion of the FOIA which requires the prompt disclosure and indexing of final opinions and statements of policy that have been adopted by the agency. 5 U.S.C. § 552(a)(2). We held that, with respect to final opinions, Exemption 5 can never apply; with respect to other documents covered by 5 U.S.C. § 552(a)(2), we said that we would be "reluctant" to hold that the Exemption 5 privilege would ever apply. 421 U.S., at 153-154. These observations, however, were made in the course of a discussion of the privilege for predecisional communications. It should be obvious that the kind of mutually exclusive relationship between final opinions and statements of policy, on one hand, and predecisional communications on the other, does not necessarily exist between final statements of policy and other Exemption 5 privileges. In this respect, we note that Sears itself held

C

The only remaining questions are whether the Domestic Policy Directives constitute confidential commercial information of the sort given qualified protection by Exemption 5, and if so, whether they would in fact be privileged in civil discovery. Although the analogy is not exact, we think that the Domestic Policy Directives and associated tolerance ranges are substantially similar to confidential commercial information generated in the process of awarding a contract. During the month that the Directives provide guidance to the Account Manager, they are surely confidential, and the information is commercial in nature because it relates to the buying and selling of securities on the open market. Moreover, the Directive and associated tolerance ranges are generated in the course of providing on-going direction to the Account Manager in the execution of large-scale transactions in government securities; they are, in this sense, the Government's by-sell order to its broker.

. . . .

Under the circumstances, we do not consider whether, or to what extent, the Domestic Policy Directives would in fact be afforded protection in civil discovery. That determination must await the development of a proper record. If the District Court on remand concludes that the Directives would be afforded protection, then it should also consider whether the operative portions of the Domestic Policy Directives can feasibly be segregated from the purely descriptive materials therein, and the latter made subject to disclosure or publication without delay. See EPA v. Mink, 410 U.S., at 91.

The judgment of the Court of Appeals is therefore vacated and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Note: The "commercial privilege" recognized in Merrill has been relied upon to protect certain cost data used by the Army to prepare its bid in a "contracting out" setting. Morrison-Knudson Co. v. Dep't of the Army, 595 F. Supp. 352 (D.D.C. 1984), aff'd, 762 F.2d 138 (D.C.

---

that a memorandum subject to the affirmative disclosure requirement of § 552(a)(2) was nevertheless shielded from disclosure under Exemption 5 because it contained privileged attorney's work product. 421 U.S., at 160.

Cir. 1985) (table cite). Detailed guidance explaining which categories of documents in this process should be disclosed and which should be withheld is found in AR 5-20, para. 4-6e.

d. Another governmental privilege permitting withholding under Exemption 5 involves certain confidential witness statements which are used by the government to formulate policy. This privilege recognizes that some information, including factual data, would be unavailable to the government in its decisionmaking process unless an assurance of confidentiality were made. This narrow privilege has been almost exclusively limited to military aircraft accident investigations (safety investigations). The Supreme Court recognized this privilege within Exemption 5 in the following case.

United States v. Weber Aircraft Corp.
465 U.S. 792 (1984)
[most footnotes omitted]

OPINION OF THE COURT

Justice Stevens delivered the opinion of the Court.

The Freedom of Information Act (FOIA), 5 USC § 552 (1982 ed.) requires federal agencies to disclose records that do not fall into one of nine exempt categories. The question presented is whether confidential statements obtained during an Air Force investigation of an air crash are protected from disclosure by Exemption 5, which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

I

On October 9, 1973, the engine of an Air Force F-106B aircraft failed in flight. Captain Richard Hoover, the pilot, was severely injured when he ejected from the plane. Under Air Force regulations, the incident was a significant air crash that required two separate investigations: a "collateral investigation" and a "safety investigation."

The collateral investigation is conducted "to preserve available evidence for use in claims, litigation, disciplinary actions, administrative proceedings, and all other purposes." Witnesses in a collateral investigation testify under oath and generally are protected by the procedural safeguards that are applicable in other formal hearings. The record of the collateral investigation is public.

The "safety investigation" is quite different. It is conducted by a specially appointed tribunal which prepares a report that is intended for "the sole purpose of taking corrective action in the interest of accident prevention." To encourage witnesses to speak fully and frankly, they are not sworn and receive an assurance that their statements will not be used for any purpose other than accident prevention. Air Force regulations contain a general prohibition against the release of safety investigation reports and their attachments, subject to an exception which allows the Judge Advocate General to release specific categories of "factual information" and "nonpersonal evidence."[7]

After the collateral and safety investigations had been completed, Captain Hoover filed a damages action against various entities responsible for the design and manufacture of his plane's ejection equipment. During pretrial discovery in that litigation, two of the parties (respondents Weber and Mills) sought discovery of all Air Force investigative reports pertaining to the accident. The Air Force released the entire record of the collateral investigation, as well as certain factual portions of the safety investigation, but it refused to release the confidential portions of the safety investigation.

Confidential statements made to air crash safety investigators were held to be privileged with respect to pretrial discovery over 20 years ago. Machin v. Zukert, 114 U.S. App. D.C. 335, 316 F.2d 336, cert. denied 375 U.S. 896 (1963). That holding effectively prevented respondents from obtaining the pretrial discovery they sought--specifically the unsworn statements given by Captain Hoover and by the airman who had rigged and maintained his parachute equipment. Respondents therefore filed requests for those

---

[7] AF Reg. 127-4 & 19(a)(4) (Jan. 1, 1973) states: "Notwithstanding the restrictions on use of these reports and their attachments and the prohibitions in this regulation against their release, factual material included in accident/incident reports, covering examination of wreckage, photographs, plotting charts, wreckage diagrams, maps, transcripts of air traffic communications, weather reports, maintenance records, crew qualifications, and like nonpersonal evidence may be released as required by law or pursuant to court order or upon specific authorization of The Judge Advocate General after consultation with The Inspector General. Also, Federal law requires that an accused in a trial by court-martial will, upon proper court order, be furnished all statements sworn or unsworn in any form which have been given to any Federal agent, employee, investigating officer, or board by any witness who testifies against the accused."

statements under the FOIA, and when the Air Force refused production, they commenced this action.

In the District Court the Government filed an affidavit executed by the General responsible for Air Force safety investigations, explaining that the material that had been withheld contained "conclusions, speculations, findings and recommendations made by the Aircraft Mishap Investigators" as well as "testimony presented by witnesses under a pledge of confidentiality." App 38. The affidavit explained why the General believed that the national security would be adversely affected by the disclosure of such material.[11] The District

---

[11] "[T]he release of the withheld portions of the Aircraft Mishap Investigation for litigation purposes would be harmful to our national security. The strength of the United States Air Force, upon which our national security is greatly dependent, is seriously affected by the number of major aircraft accidents which occur. The successful flight safety program of the United States Air Force has contributed greatly to the continuously decreasing rate of such accidents. The effectiveness of this program depends to a large extent upon our ability to obtain full and candid information on the cause of each aircraft accident. Much of the information received from persons giving testimony in the course of an aircraft mishap investigation is conjecture, speculation and opinion. Such full and frank disclosure is not only encouraged but is imperative to a successful flight safety program. Open and candid testimony is received because witnesses are promised that for the particular investigation their testimony will be used solely for the purpose of flight safety and will not be disclosed outside of the Air Force. Lacking authority to subpoena witnesses, accident investigators must rely on such assurances in order to obtain full and frank discussion concerning all the circumstances surrounding an accident. Witnesses are encouraged to express personal criticisms concerning the accident.

. . . . . .

"If aircraft mishap investigators were unable to give such assurances, or if it were felt that such promises were hollow, testimony and input from witnesses and from manufacturers in many instances would be less than factual and a determination of the exact cause factors of accidents would be jeopardized. This would seriously hinder the accomplishment of prompt corrective action designed to preclude the occurrence of a similar accident. This privilege, properly accorded to the described portions of an United States Air Force Mishap Report of Investigation, including those portions reflecting the deliberations of the Investigating Board, is the very

Court held that the material at issue would not be available by law to a party other than an agency in litigation with an agency, and hence need not be disclosed by virtue of Exemption 5. The Court of Appeals reversed. It agreed that the requested documents were "intra-agency memorandums" within the meaning of Exemption 5, and that they were protected from civil discovery under the Machin privilege. It held, however, that the statutory phrase "would not be available by law" did not encompass every civil discovery privilege but rather reached only those privileges explicitly recognized in the legislative history of FOIA. It read that history as accepting an executive privilege for pre-decisional documents containing advice, opinions or recommendations of government agents, but as not extending to the Machin civil discovery privilege for official government information. It accordingly remanded the case with directions to disclose the factual portions of the witnesses' statements.

II

The plain language of the statute itself, as construed by our prior decisions, is sufficient to resolve the question presented. The statements of the two witnesses are unquestionably "intra-agency memorandums or letters"[13] and, since the Machin privilege normally protects them from discovery in civil litigation, they "would not be available by law to a party other than [the Air Force] in litigation with [the Air Force]."

Last Term, in FTC v. Grolier Inc., 462 U.S. 19 (1983), we held that Exemption 5 simply incorporates civil discovery privileges: "The test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." Id. at 26. Thus, since the Machin privilege is well recognized in the case law as precluding routine disclosure of the statements, the statements are covered by Exemption 5.

Grolier was consistent with our prior cases. For example, Grolier itself relied on Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975), which Grolier quoted on the scope of Exemption 5: "Exemption 5 incorporates the privileges which the government enjoys under the relevant statutory and case law in the pretrial discovery context." 462 U.S. at 26-27 (emphasis added in Grolier) (quoting 421 U.S. at 184). Similarly, in

---

foundation of a successful Air Force flight safety program." App 38-39.

[13] Weber contends that "intra-agency memorandums or letters" cannot include statements made by civilians to Air Force personnel. Whatever the merits of this assertion, it is irrelevant to this case since the material at issue here includes only statements made by Air Force personnel.

NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), we wrote: "Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency." Id. at 148.[16] In FOMC v. Merrill, 443 U.S. 340 (1979), we wrote: "The House Report [on the FOIA] states that Exemption 5 was intended to allow an agency to withhold intra-agency memoranda which would not be 'routinely disclosed to a private party through the discovery process in litigation with the agency. . . .'" Id. at 353 (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966)). And in EPA v. Mink, 410 U.S. 73 (1973), the Court observed: "This language clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency." Id. at 86.

Respondents read Merrill as limiting the scope of Exemption 5 to privileges explicitly identified by Congress in the legislative history of the FOIA. But in Merrill we were confronted with a claimed exemption that was not clearly covered by a recognized pretrial discovery privilege. We held that Exemption 5 protected the Federal Open Market Committee's Domestic Policy Directives although it was not entirely clear that they fell within any recognized civil discovery privilege because statements in the legislative history supported an inference that Congress intended to recognize such a privilege. See 443 U.S. at 357-360. Thus, the holding of Merrill was that a privilege that was mentioned in the legislative history of Exemption 5 is incorporated by the Exemption--not that all privileges not mentioned are excluded. Moreover, the Merrill dictum upon which respondents rely merely indicates "that it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery." Id. at 354. It is one thing to say that recognition under Exemption 5 of a novel privilege, or one that has found less than universal acceptance, might not fall within Exemption 5 if not discussed in its legislative history. It is quite another to say that the Machin privilege, which has been well-settled for some two decades, need be viewed with the same degree of skepticism.[18] In

---

[16] See also id., at 149, 44 L Ed 2d 29, 95 S Ct 1504 (footnote omitted) ("[I]t is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context.").

[18] Moreover, in the Merrill dictum we added: "We hesitate to construe Exemption 5 to incorporate a civil discovery privilege that would substantially duplicate another exemption." Id. at 355. Respondents do not explain how incorporation of the Machin privilege into Exemption 5 would substantially duplicate another exemption. The relevance of the Merrill dictum is further reduced by the fact that in Merrill the Court explicitly reserved the question whether the Machin privilege falls within Exemption 5. See id. at 355-356, n.17. Thus Merrill could hardly control the question we face today.

any event, the Merrill dictum concludes only that "a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution." Id. at 355. The claim of privilege sustained in Machin was denominated as one of executive privilege. See 114 U.S. App. D.C. at 337, 316 F.2d at 338. Hence the dictum is of little aid to respondents.

Moreover, respondents' contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA. See Baldridge v. Shapiro, 455 U.S. 345, 360, n.14 (1982); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143, n.10 (1975); Renegotiation Board v. Bannercraft Co., 415 U.S. 1 (1973). We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented.[20]

We therefore simply interpret Exemption 5 to mean what it says. The judgment of the Court of Appeals is reversed.

Note. Two cases involving Inspector General reports have upheld the withholding of the conclusions, recommendations, and "confidential" witness statements contained in those reports. See American Federation of Government Employees v. Department of the Army, 441 F. Supp. 1308 (D.D.C. 1977) and Ahearn v. Department of the Army, 580 F. Supp. 1405 (D. Mass.), supplemental decision, 583 F. Supp. 1123 (D. Mass. 1984). The supplemental decision in Ahearn relied explicitly upon the Supreme Court's reasoning in Weber Aircraft. For a decision applying traditional deliberative process privilege principles to an Inspector General's report, see Providence Journal Co. v. United States Dep't of the Army, 981 F.2d 552 (1st Cir. 1992) (upholding nondisclosure of IG's conclusions as to whether allegations were substantiated or unsubstantiated, findings of fact, and final recommendations).

2.6 Exemption 6: Personnel, Medical and Similar Files.

---

[20] Respondents also argue that their need for the requested material is great and that it would be unfair to expect them to defend the litigation brought against them by Captain Hoover without access to it. We answered this argument in Grolier, noting that the fact that in particular litigation a party's particularized showing of need may on occasion justify discovery of privileged material in order to avoid unfairness does not mean that such material is routinely discoverable and hence outside the scope of Exemption 5. See 462 U.S. at 27-28. Respondents must make their claim of particularized need in their litigation with Captain Hoover, since it is not a claim under the FOIA.

This exemption permits the withholding of all information about individuals in "personnel, medical and similar files" if its disclosure "would constitute a clearly unwarranted invasion of personal privacy." If a privacy interest exists, then the rights of the individual are balanced against the public interest in disclosure. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989); Department of the Air Force v. Rose, 425 U.S. 352 (1976). This exemption under FOIA is consistent with the Privacy Act. The relationship between the Freedom of Information Act and the Privacy Act is discussed in Chapter 4.

2.7 Exemption 7: Records or Information Compiled for Law Enforcement Purposes.

The Freedom of Information Reform Act of 1986 substantially broadened protection of sensitive law enforcement documents by amending Exemption 7 and by creating exclusions (see subchapter 2-8). The discussions appearing below in subparts a. and b. reflect the state of the law prior to the 1986 reforms. These discussions remain valid except as amended by the Reform Act. The reforms were summarized by the United States Department of Justice in its FOIA Update (Fall 1986) as follows:

- -- The threshold language of Exemption 7 is broadened to encompass both "records or information compiled for law enforcement purposes," a formulation which also drops the former requirement that the records be "investigatory" in character.

- -- The exemption's harm standard is considerably lessened, from "would" to "could reasonably be expected to," under Exemption 7(A) (protecting ongoing proceedings), Exemption 7(C) (personal privacy), Exemption 7(D) (law enforcement sources) and Exemption 7(F) (physical safety).

- -- Exemption 7(D) is reworded to expressly provide a greater range of source protection.

- -- Exemption 7(E) is expanded to cover prosecutorial techniques and law enforcement guidelines.

- -- Exemption 7(F) is broadened to extend its protection to any individual.

a. The Attorney General's 1975 Memorandum discusses the changes made in Exemption 7 by the 1974 amendments.

Attorney General's Memorandum on the
1974 Amendments to the Freedom of
Information Act (February 1975)

I-B. CHANGES IN EXEMPTION 7 (INVESTIGATORY LAW ENFORCEMENT RECORDS)

INTRODUCTION

The 1974 Amendments to the Freedom of Information Act substantially altered the exemption concerning investigatory material compiled for law enforcement purposes. Prior to the amendments, the Act permitted the withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." The 1974 Amendments substitute the term "records" for "files," and prescribe that the withholding of such records be based upon one or more of six specified types of harm. The revised exemption now reads:

> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

There follows a discussion of the phrase "investigatory records compiled for law enforcement purposes," the six bases for withholding investigatory material, and the implementation of the amended provision.

THE MEANING OF "INVESTIGATORY RECORDS COMPILED FOR LAW ENFORCEMENT PURPOSES"

A series of court decisions had construed the prior provision as exempting any material contained in a file properly designated as an investigatory file compiled for law enforcement purposes. The primary purpose of Senator Hart's amendment to revise exemption 7 was to overturn the result of those decisions and to require consideration of the particular document and the need to withhold it. (See, e.g., 120 Cong. Rec. S 9329-30 (May 30, 1974).)

Because of the change from "files" to "records" and the provision concerning reasonably segregable portions of records (see Part I-C, below), the particular documents must ordinarily be examined. The threshold questions are whether the requested material is "investigatory" and whether it was compiled for law enforcement purposes." These terms were not defined in the original Act and are not defined in the Act as amended.

"Investigatory records" are those which reflect or result from investigative efforts. The latter may include not merely activities in which agencies take the initiative, but also the receipt of complaints or other communications indicating possible violations of the law, where such receipt is part of an overall program to prevent, detect or counteract such violations, or leads to such an effort in the particular case.

Under the original Act, "law enforcement" was construed administratively and by the courts as applying to the enforcement of law not only through criminal prosecutions, but also through civil and regulatory proceedings, so that investigations by agencies with no criminal law enforcement responsibilities were included. The legislative history of the 1974 Amendments indicates that no change in this basic concept was contemplated. (See, e.g., Conf. Rept. p. 13.)

"Law enforcement" includes not merely the detection and punishment of law violation, but also its prevention. Thus, lawful national security intelligence investigations are covered by the exemption, as are background security investigations and personnel investigations of applicants for Government jobs under Executive Order 10450. (Cf. Conf. Rept. p. 13.) On the other hand, not every type of governmental information-gathering qualifies. Records of more general information-gathering activities (e.g., reporting forms submitted by a regulated industry or by recipients of Federal grants) developed in order to monitor, generally or in particular cases, the effectiveness of existing programs and to determine whether changes may be appropriate, should not be considered "compiled for law enforcement purposes" except where the purpose for which the records are held and used by the agency becomes substantially violation-oriented, i.e., becomes re-focused on preventing, discovering or applying sanctions against noncompliance with federal statutes or regulations. Records generated for such purposes as determining the need for new

regulations or preparing statistical reports are not "for law enforcement purposes."

THE SIX BASES FOR INVOKING EXEMPTION 7

Once it is determined that a request pertains to "investigatory records compiled for law enforcement purposes," the next question is whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended exemption 7. If not, the material must be released despite its character as an investigatory record compiled for law enforcement purposes, and (generally speaking) even when the requester is currently involved in civil or criminal proceedings with the Government. (Of course exemptions other than exemption 7 may be applicable, or restrictions upon disclosure other than those expressly set forth in the Freedom of Information Act--for example, the prohibition against disclosing the transcript of grant jury proceedings, Rule 6 of the Federal Rules of Criminal Procedure.)

The six bases of nondisclosure set forth in 5 U.S.C. § 552(b)(7) (A)-(F) may be explained as follows:

(A) INTERFERENCE WITH ENFORCEMENT

Under clause 552(b)(7)(A), nondisclosure is justified to the extent that production of the records would "interfere with enforcement proceedings." This clause is derived, without change, from Senator Hart's amendment.

The term "enforcement proceedings" is not defined, but it seems clear that its scope corresponds generally to that of "law enforcement purposes," covering criminal, civil and administrative proceedings. Moreover, in explaining this clause of his amendment, Senator Hart made clear he considered proceedings to be "interfered with" when investigations preliminary to them are interfered with. He used the term "enforcement procedures" as synonymous with "enforcement proceedings" to describe the over-all coverage of the clause. (120 Cong. Rec. S 9330 (May 30, 1974).) Thus, records of a pending investigation of an applicant for a Government job would be withholdable under clause (A) to the extent that their production would interfere with the investigation.

Normally, clause (A) will apply only to investigatory records relating to law enforcement efforts which are still active or in prospect--sometimes administratively characterized as records in an "open" investigatory file. But this will not always be the case. There may be situations (e.g., a large conspiracy) where, because of the close relationship between the subject of a closed file and the subject of an open file, release of material from the former would interfere with the active proceeding. Also, material within a closed file

of one agency may bear directly upon active proceedings of another agency, Federal or State.

The meaning of "interfere" depends upon the particular facts. (120 Cong. Rec. S 9330 (May 30, 1974) (Senator Hart).) One example of interference when litigation is pending or in prospect is harm to the Government's case through the premature release of information not possessed by known or potential adverse parties. Ibid. Regarding investigations, interference would be created by a release which might alert the subject to the existence of the investigation, or which would "in any other way" threaten the ability to conduct the investigation. (120 Cong. Rec. S 9337 (May 30, 1974) (letter of Senator Hart).) The legislative history indicates that, while the 7th exemption as it previously stood was to be narrowed by changing "files" to "records" and specifying six bases for asserting the exemption, these new bases themselves were to be construed in a flexible manner. (See, e.g., 120 Cong. Rec. S 9330 (May 30, 1974) (Senator Hart); 120 Cong. Rec. S 19812 (Nov. 21, 1974) (Senator Hart).) This applies to clause (A) and may properly be considered in determining the meaning of "interfere."

(B) DEPRIVATION OF RIGHT TO FAIR TRIAL OR ADJUDICATION

Clause (B) permits withholding to the extent that production would "deprive a person of a right to a fair trial or an impartial adjudication." This provision also came, without change, from Senator Hart's amendment; no specific explanation of it is contained in the legislative history.

A fundamental difference between clause (A) and clause (B) is that, while the former is intended primarily to protect governmental functions, clause (B) protects the rights of private persons. "Person" is defined in the Administrative Procedure Act (APA), of which the Freedom of Information Act is a part, to include corporations and other organizations as well as individuals. (5 U.S.C. 551(2).) The term "trial" is undefined, but would normally be thought to apply to judicial proceedings, both civil and criminal, in Federal and State courts. "Adjudication" is defined in the APA to mean the procedure by which Federal agencies formulate decisions in U.S.C. 551(7); see also 5 U.S.C. 551(4), (6), (9), and (12). It is unlikely, however, that this definition was intended to apply here, since there is no apparent reason why Federal ratemaking or, for that matter, the most important state administrative proceedings should have been thought undeserving of any protection in contrast to informal and relatively inconsequential determinations that may qualify as Federal "adjudication" technically speaking (e.g., approval or denial of an application for a small grant for a cultural demonstration trip.) It will be seen elsewhere as well that the drafting of these Amendments apparently does not presume the APA definition of "adjudication." (See Part II-B, pp. 19-20 below.) It would seem best to interpret the word in this clause to refer to

structured, relatively formal, quasi-judicial administrative determinations in both State and Federal agencies, in which the decision is rendered upon a consideration of statutorily or administratively defined standards.

Clause (B) would typically be applicable when requested material would cause prejudicial publicity in advance of a criminal trial, or a civil case tried to a jury. The provision is obviously aimed at more than just inflammation of jurors, however, since juries do not sit in administrative proceedings. In some circumstances, the release of damaging and unevaluated information may threaten to distort administrative judgment in pending cases, or release may confer an unfair advantage upon one party to an adversary proceeding.

(C) INVASION OF PRIVACY

Clause (C) exempts law enforcement investigatory records to the extent that their production would "constitute an unwarranted invasion of personal privacy." The comparable provision in Senator Hart's amendment referred to "clearly unwarranted" invasions, but "clearly" was deleted by the Conference Committee.

Except for the omission of "clearly," the language of clause (C) is the same as that contained in the original Act for the sixth exemption, the exemption for personnel, medical and similar files. Thus, in determining the meaning of clause (C), it is appropriate to consider the body of court decisions regarding the latter--bearing in mind, of course, that the deletion of "clearly" renders the Government's burden somewhat lighter under the new provisions. (See, e.g., 120 Cong. Rec. H. 10003 (Oct. 7, 1974) (letter of chairman of conferees).) In applying clause (C), it will also be necessary to take account of the Privacy Act of 1974, Public Law 93-579, which takes effect in September 1975.

The phrase "personal privacy" pertains to the privacy interests of individuals. Unlike clause (B), clause (C) does not seem applicable to corporations or other entities. The individuals whose interests are protected by clause (C) clearly include the subject of the investigation and "any [other] person mentioned in the requested file." (120 Cong. Rec. S 9330 (May 30, 1974) (Senator Hart).) In appropriate situations, clause (C) also protects relatives or descendants of such persons.

While neither the legislative history nor the terms of the Act and the 1974 Amendments comprehensively specify what information about an individual may be deemed to involve a privacy interest, cases under the sixth exemption have recognized, for example, that a person's home address can qualify. It is thus clear that the privacy interest does not extend only to types of information that people generally do not make public. Rather, in the present context it must be deemed generally to include information about an individual which he could reasonably assert an option to withhold from the public at large because of its intimacy or its possible adverse effects upon himself or his family.

When the facts indicate an invasion of privacy under clause (C), but there is substantial uncertainty whether such invasion is "unwarranted," a balancing process may be in order, in which the agency would consider whether the individual's rights are outweighed by the public's interest in having the material available. (Cf. Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971), and Wine Hobby U.S.A., Inc. v. United States Bureau of Alcohol, Tobacco and Firearms, 502 F.2d 133 (3d Cir. 1974) (sixth exemption cases).)

The Conference Report states (p. 13) that "disclosure of information about a person to that person does not constitute an invasion of his privacy." It must be noted, however, that records concerning one individual may contain information affecting the privacy interests of others. Of course, when information otherwise exempt under clause (C) is sought by a requester claiming to be the subject of the information, the agency may require appropriate verification of identity.

(D) DISCLOSURE OF CONFIDENTIAL SOURCES OR INFORMATION PROVIDED BY SUCH SOURCES

Clause (D), which was substantially broadened by the Conference Committee, exempts material the production of which would:

> disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source.

The first part of this provision, concerning the identity of confidential sources, applies to any type of law enforcement investigatory record, civil or criminal. (Conf. Rept. p. 13.) The term "confidential source" refers not only to paid informants but to any person who provides information "under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred." Ibid. In DOJ v. Landano, 508 U.S. ___, 113 S. Ct. 2014 (1993), the Supreme Court rejected a Government attempt to establish that it would be presumptively proper to withhold the name, address, and other identifying information regarding a citizen who submits a complaint or report indicating a possible violation of law. The Court stated that while there may be narrowly defined circumstances where the nature of the crime or the source's relation to the crime may support an implied assurance of confidentiality, there is no presumption that a source providing information to the FBI in the course of a criminal investigation is confidential. Of course, a source can be confidential with respect to some items of information he provides, even if he furnishes other information on an open basis; the test, for

purposes of the provision, is whether he was a confidential source with respect to the particular information requested, not whether all connection between him and the agency is entirely unknown.

The second part of clause (D) deals with information provided by a confidential source. Generally speaking, with respect to civil matters, such information may not be treated as exempt on the basis of clause (D), except to the extent that its disclosure would reveal the identity of the confidential source. However, with respect to criminal investigations conducted by a "criminal law enforcement authority" and lawful national security intelligence investigations conducted by any agency, any confidential information furnished only by a confidential source is, by that fact alone, exempt. (See, e.g., 120 Cong. Rec. S 19812 (Nov. 21, 1974) (Senator Hart).)

According to the Conference Report (p. 13), "criminal law enforcement authority" is to be narrowly construed and includes the FBI and "similar investigative authorities." It would appear, then, that "criminal law enforcement authority" is limited to agencies-or agency components--whose primary function is the prevention or investigation of violations of criminal statutes (including the Uniform Code of Military Justice), or the apprehension of alleged criminals. There may be situations in which a criminal law enforcement authority, e.g., the FBI or a State authority obtains confidential information from a confidential source in the course of a criminal investigation and then provides a copy to another Federal agency. In the event that a Freedom of Information Act request is directed to the latter agency, nondisclosure based on the second part of clause (D) is proper, regardless of whether the requested agency is itself a "criminal law enforcement authority." What determines the issue is the character of the agency that "compiled" the record.

With respect to that portion of the second part of clause (D) dealing with national security intelligence investigations, the Conference Report states (p. 13) that it applies not only to such investigations conducted by criminal law enforcement authorities but to those conducted by other agencies as well. According to the report, "national security" is to be strictly construed and refers to "military security, national defense, or foreign policy"; and "intelligence" is intended to apply to "positive intelligence-gathering activities, counter-intelligence activities, and background security investigations by [authorized] governmental units * * *." Ibid.

A further qualification contained in this second part of clause (D) is that the confidential information must have been furnished "only by the confidential source." In administering the Act, it is proper to consider this requirement as having been met if, after reasonable review of the records, there is no reason to believe that identical information was received from another source.

(E) DISCLOSURE OF TECHNIQUES AND PROCEDURES

Clause (E), derived without change from Senator Hart's amendment, exempts records to the extent that release would "disclose investigative techniques and procedures."

The legislative history indicates that this exemption does not apply to routine techniques or procedures which are generally known outside the Government. (See, e.g., Conf. Rept. p. 12.) For example, the exemption does not protect the disclosure of such procedures as ballistics tests and fingerprinting, though it would shield new developments or refinements in those procedures. (Of course, the results of such generally known procedures may be exempt on another ground.) Administrative staff manuals and instructions, covered by 5 U.S.C. § 552(a)(2), are not generally protected by this clause (Conf. Rept. p. 13), although the exempt status of material otherwise covered by clause (E) is not affected by its inclusion in such a manual or instruction.

(F) ENDANGERING LAW ENFORCEMENT PERSONNEL

Clause (F), which was added by the Conference Committee, exempts material whose disclosure would "endanger the life or physical safety of law enforcement personnel." (See, e.g., 120 Cong. Rec. II 10003-04 (Oct. 7, 1974) (letter of chairman of conferees).) The legislative record contains little discussion of this provision.

Clause (F) might apply, for example, to information which would reveal the identity of undercover agents, State or Federal, working on such matters as narcotics, organized crime, terrorism, or espionage. It is unclear whether the phrase "law enforcement personnel" means that the endangered individual must be technically an "employee" of a law enforcement organization; arguably it does not. It is clear, however, that the language of clause (F) cannot be stretched to protect the safety of the families of law enforcement personnel or the safety of other persons. Nonetheless, it is safe to proceed on the assumption that Congress did not intend to require the release of any investigatory records which would pose a threat to the life or physical safety of any person; perhaps clause (A) (interference with law enforcement) would be liberally construed to cover a request which involves such a threat.

IMPLEMENTATION OF EXEMPTION 7

The prior discussion deals with the grounds for nondisclosure that are specified in amended section 552(b)(7). Application of these grounds by agency personnel within the available time limits will often present great difficulty, especially when the request pertains to a large file. One means by which the agency might seek to assist its personnel--and the public--is the

development of guidelines regarding the manner of applying the exemption 7 clauses to standard categories of investigatory records in its files.

The general policy underlying the seventh exemption is maximum public access to requested records, consistent with the legitimate interests of law enforcement agencies and affected persons. (See, e.g., 120 Cong. Rec. S 9330 (May 30, 1974) (Senator Hart).) A central issue which must be faced in every case is the type of showing needed to establish that disclosure "would" lead to one of the consequences enumerated in clauses (A) through (F). The President and some opponents of the bill voiced concern that "would" connoted a degree of certainty which in most cases it would be impossible to establish. (See Weekly Compilation of Presidential Documents 1318 (1974); 120 Cong. Rec. S 19814 (Nov. 21. 1974) (Senator Hruska); 120 Cong. Rec. S 19818 (Nov. 21, 1974) (Senator Thurmond).) The bill's proponents, including the sponsor of the amendment, did not accept the interpretation that would result in such a strict standard. (See, e.g., 120 Cong. Rec. II 10865 (Nov. 20, 1974) (Congressman Moorhead); 120 Cong. Rec. S 19812 (Nov. 21, 1974) (Senator Hart).) This legislative history suggests that denial can be based upon a reasonable possibility, in view of the circumstances that one of the six enumerated consequences would result from disclosure.

A practical problem which can be predicted is that agency personnel will sometimes be uncertain whether they have sufficient information to make the necessary determination as to the likelihood of one of the six consequences justifying nondisclosure. This raises the question whether it is necessary to go beyond the records themselves and in effect to conduct an independent investigation to determine, for example, what privacy or confidentiality interests are involved. This question cannot be answered in the abstract, for its resolution will depend substantially upon the particular circumstances. Since the six clauses in the exemption are to be interpreted in a flexible manner, see p. 8 above, it should usually be sufficient to rely upon conclusions which--taking due account of such factors as the age of the records and the character of law violation involved--can reasonably be drawn from the records themselves.

It is clear that implementation of the amended exemption 7 will frequently involve a substantial administrative burden. It was not, however, the intent or the expectation of the Congress that this burden would be excessive. (See, e.g., 120 Cong. Rec. S 19808 (Nov. 21, 1974) (Senator Kennedy); 120 Cong. Rec. S 19812 (Nov. 21, 1974) (Senator Hart).) If, therefore, a law enforcement agency (the category of agencies principally affected) regularly finds that its application of these provisions involves an effort so substantial as to interfere with its necessary law enforcement functions, it should carefully re-examine the manner in which it is interpreting or applying them. Needless to say, burden is no excuse for intentionally disregarding or slighting the requirements of the law, and, where necessary, additional resources should be sought or provided to achieve full compliance.

b. Much of the post-amendment Exemption 7 litigation has involved attempts to obtain witness statements obtained by agencies during their investigations. As pointed out by the authors of a note in the American Criminal Law Review, "it may be risky to generalize from the labor relations setting to the criminal context." Note, The Freedom of Information Act--A Potential Alternative to Conventional Criminal Discovery, 14 Am. Crim. L. Rev. 73, 116 (1976). In the following case, the Supreme Court permitted the National Labor Relations Board to withhold pre-hearing statements of prospective witness upon a generalized showing of "interference" with enforcement proceedings under Exemption 7(A).

National Labor Relations Board v.
Robbins Tire and Rubber Company,
437 U.S. 214, 57 L. Ed. 2d 159 (1978)

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The question presented is whether the Freedom of Information Act (FOIA), 5 U.S.C. § 552, requires the National Labor Relations Board to disclose, prior to its hearing on an unfair labor practice complaint, statements of witnesses whom the Board intends to call at the hearing. Resolution of this question depends on whether production of the material prior to the hearing would "interfere with enforcement proceedings" within the meaning of Exemption 7(A) of FOIA, 5 U.S.C. § 552(b)(7)(A).

. . . .

II

We have had several occasions recently to consider the history and purposes of the original Freedom of Information Act of 1966. See EPA v. Mink, 410 U.S. 73, 79-80 (1973); Renegotiation Board v. Bannercraft Clothing Co., Inc., 415 U.S. 1 (1974); NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); Department of the Air Force v. Rose, 425 U.S. 352 (1976). As we have repeatedly emphasized, "the Act is broadly conceived," EPA v. Mink, supra, at 80, and its "basic policy" in is favor of disclosure, Dep't of Air Force v. Rose, supra, at 361. In 5 U.S.C. § 552(b), Congress carefully structured nine exemptions from the otherwise mandatory disclosure requirements in order to protect specified confidentiality and privacy interests. But unless the requested material falls within one of these nine statutory exemptions. FOIA requires that records and material in the possession of federal agencies be made available on demand to any member of the general public.

Exemption 7 as originally enacted permitted nondisclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." 80 Stat. 251 (1966). In 1974, this exemption was rewritten to permit the nondisclosure of "investigatory records compiled for law enforcement purposes," but only to the extent that producing such records would involve one of six specified dangers. The first of these, with which we are here concerned, is that production of the records would "interfere with enforcement proceedings."

The Board contends that the original language of Exemption 7 was expressly designed to protect existing NLRB policy forbidding disclosure of statements of prospective witnesses until after they had testified at unfair labor practice hearings. In its view, the 1974 Amendments preserved Congress' original intent to protect witness statements in unfair labor practice proceedings from premature disclosure, and were directed primarily at case law that had applied Exemption 7 too broadly to cover any material, regardless of its nature, in an investigatory file compiled for law enforcement purpose. The Board urges that a particularized, case-by-case showing is neither required nor practical, and that witness statements in pending unfair labor practice proceedings are exempt as a matter of law from disclosure while the hearing is pending.

Respondent disagrees with the Board's analysis of the 1974 Amendments. It argues that the legislative history conclusively demonstrates that the determination of whether disclosure of any material would "interfere with enforcement proceedings" must be made on an individual, case-by-case basis. While respondent agrees that the statements sought here are "investigatory files compiled for law enforcement purposes," and that they are related to an imminent enforcement proceeding, it argues that the Board's failure to make a specific factual showing that their release would interfere with this proceeding defeats the Board's Exemption (7) claim.

A

The starting point of our analysis is with the language and structure of the statute. We can find little support in the language of the statute itself for respondent's view that determinations of "interference" under Exemption 7(A) can be made only on a case-by-case basis. Indeed, the literal language of Exemption 7 as a whole tends to suggest that the contrary is true. The Exemption applies to:

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D)

> disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

There is a readily apparent difference between subdivision (A) and subdivisions (B), (C), and (D). The latter subdivisions refer to particular cases--"a person," "an unwarranted invasion," "a confidential source"--and thus seem to require a showing that the factors made relevant by the statute are present in each distinct situation. By contrast, since subdivision (A) speaks in the plural voice about "enforcement proceedings," it appears to contemplate that certain generic determinations might be made.

Respondent points to other provisions of FOIA in support of its interpretation. It suggests that because FOIA expressly provides for disclosure of segregable portions of records and for in camera review of documents, and because the statute places the burden of justifying nondisclosure on the Government, 5 U.S.C. §§ 552(a)(4)(B), (b), the Act necessarily contemplates that the Board must specifically demonstrate in each case that disclosure of the particular witnesses' statement would interfere with a pending enforcement proceeding. We cannot agree. The in camera review provision is discretionary by its terms, and is designed to be invoked when the issue before the District Court could not be otherwise resolved; it thus does not mandate that the documents be individually examined in every case. Similarly, although the segregability provision requires that nonexempt portions of documents be released, it does not speak to the prior question of what material is exempt. Finally, the mere fact that the burden is on the Government to justify nondisclosure does not, in our view, aid the inquiry as to what kind of burden the Government bears.

We thus agree with the parties that resolution of the question cannot be achieved through resort to the language of the statute alone. Accordingly, we now turn to an examination of the legislative history.

. . . .

. . . We conclude that Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally "interfere with enforcement proceedings."

III

The remaining question is whether the Board has met its burden of demonstrating that disclosure of the potential witnesses' statements at this time "would interfere with enforcement proceedings." A proper resolution of this question requires us to weigh the strong presumption in favor of disclosure under FOIA against the likelihood that disclosure at this time would disturb the existing balance of relations in unfair labor practice proceedings, a delicate balance that Congress has deliberately sought to preserve and that the Board maintains is essential to the effective enforcement of the NLRA. Although reasonable arguments can be made on both sides of this issue, for the reasons that follow we conclude that witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until completion of the Board's hearing.

Historically, the NLRB has provided little prehearing discovery in unfair labor practice proceedings and has relied principally on statements such as those sought here to prove its case. While the NLRB's discovery policy has been criticized, the Board's position that § 6 of the NLRA, 29 U.S.C. § 156, commits the formulation of discovery practice to its discretion has generally been sustained by the lower courts. A profound alteration in the Board's trial strategy in unfair labor practice cases would thus be effectuated if the Board were required, in every case in which witnesses' statements were sought under FOIA prior to an unfair labor practice proceeding, to make a particularized showing that release of these statements would interfere with the proceeding.

Not only would this change the substantive discovery rules, but it would do so through mechanisms likely to cause substantial delays in the adjudication of unfair labor practice charges. In addition to having a duty under FOIA to provide public access to its processes, the NLRB is charged with the duty of effectively investigating and prosecuting violations of the labor laws. See 29 U.S.C. §§ 160, 161. To meet its latter duty, the Board can be expected to continue to claim exemptions with regard to prehearing FOIA discovery requests, and numerous court contests will thereby ensue. Unlike ordinary discovery contests, where rulings are generally not appealable until the conclusion of the proceedings, an agency's denial of a FOIA request is immediately reviewable in the District Court, and the District Court's decision can then be reviewed in the Court of Appeals. The potential for delay and for restructuring of the NLRB's routine adjudications of unfair labor practice charges from requests like respondent's is thus not insubstantial. See n.17, supra.

In the absence of clear congressional direction to the contrary, we should be hesitant under ordinary circumstances to interpret an ambiguous statute to create such dislocations. Not only is such direction lacking, but Congress in 1966 was particularly concerned that premature production of witnesses' statements in NLRB proceedings would adversely affect that agency's ability to prosecute violations of the NLRA, and, as indicated above,

the legislative history of the 1974 Amendments affords no basis for concluding that Congress at that time intended to create any radical departure from prior, court-approved Board practice. See supra, at 224-234. Our reluctance to override a long tradition of agency discovery, based on nothing more than an amendment to a statute designed to deal with a wholly different problem, is strengthened by our conclusion that the dangers posed by premature release of the statements sought here would involve precisely the kind of "interference with enforcement proceedings" that Exemption 7(A) was designed to avoid.

A

The most obvious risk of "interference" with enforcement proceedings in this context is that employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all. . . .

2.8 Exclusions.

The Freedom of Information Reform Act of 1986 created an entirely new mechanism for protecting three very narrow categories of sensitive information. This "exclusion" mechanism expressly authorizes criminal law enforcement agencies to treat these sensitive records as "not subject to the requirements of the [FOIA]." If one of the exclusions applies, the agency simply responds to the FOIA request in the same manner that it does when in fact no records exist. The following discussion is from the Department of Justice's FOIA Update (Fall 1986).

Exclusions

-- Under the new "(c)(1)" exclusion, any agency possessing records of an ongoing criminal investigation or proceeding (covered by Exemption 7(A), as amended) can treat them as not subject to the requirements of the FOIA if "disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings." An agency may do so only where it reasonably believes that the subject of the proceeding is not aware of its pendency, and only so long as that circumstance continues, but it can apply this exclusion even where an investigation involves only "a possible violation of criminal law."

-- Under the "(c)(2)" exclusion, all criminal law enforcement agencies may likewise exclude informant records to resist targeted efforts by third parties to ferret out informants.

-- Under the "(c)(3)" exclusion, the FBI is empowered to exclude records pertaining to foreign intelligence, counterintelligence, or international terrorism whenever the existence of the records is a classified fact.

In it's Freedom of Information Act Guide & Privacy Act Overview (September 1998), the Department of Justice cautions that the invocation of an exclusion is complicated and requires the "utmost care." The DOJ recommends "[a]ny agency considering employing an exclusion . . . should first consult with the Office of Information and Privacy [DOJ] . . . ."

Procedurally, employing an exclusion results in a "no records" response to the requester. Such a response may be challenged if the requester believes the agency has insufficiently searched for the requested record. To preserve the exclusion's effectiveness, any response to a requestor's challenge of an exclusion must neither confirm nor deny its employment.

PART B: THE INDIVIDUAL'S RIGHT OF PRIVACY

CHAPTER 3

INFORMATION GATHERING AND INFORMATION SYSTEMS

3.1 Historical Background of the Privacy Act.

a. The Privacy Act of 1974 was the culmination of many years of public and congressional concern over the threat posed to individual privacy by the Federal Government's increasing acquisition of vast quantities of personal information on American citizens. In the 1960's both houses of Congress held numerous hearings and conducted extensive investigations into all aspects of government information-gathering techniques. This included inquiries into such things as the telephone monitoring activities of Federal agencies, the use of "lie detectors" and other privacy-invading procedures for eliciting information from Federal employees, the maintenance of Federal data banks containing large quantities of personal data on individuals, the use of criminal justice information by Federal agencies, and the military surveillance of American citizens.

Extract
Hearings on S.2318 Before the Subcommittee
on Constitutional Rights of the Senate
Committee on the Judiciary, 93d Cong.,
2d Sess. (1974)

. . . .

TESTIMONY OF ROBERT E. JORDAN III,
FORMER GENERAL COUNSEL OF THE
DEPARTMENT OF THE ARMY

. . . .

I cannot profess to any expertise with respect to military information collection activities prior to 1967. If in fact, as some have charged, there were improper information activities relating to civilians having no discernible connection with military functions or responsibilities, these were matters which didn't come to my attention. My principal area of concern during the 1967-71 period was the relationship between military intelligence collection and retention activities and the Army's civil disturbance mission.

As this committee is aware, widespread civil disturbances in the mid and late 1960's had become a source of serious concern at the local, State and

national level. Major urban disorders had flared; but until July 1967, they had been contained without an escalation of resources beyond the use of the National Guard in its State militia capacity--as in Newark and in Watts. In late July of 1967, however, disorders in Detroit brought the first use of Federal troops to deal with urban riots since 1943. In the spring of 1968, the death of Dr. King triggered disorders in a number of American cities, and required the simultaneous commitment of regular military units in Chicago, Baltimore, and Washington, D.C. I can well remember the frenetic activity surrounding the Detroit operation in 1967, and the multiple operations in 1968. A recurring problem was that there never seemed to be enough reliable and timely information upon which to make judgments concerning the alerting and prepositioning of troops, their actual commitment, the need for bringing in additional units, and timely Federal disengagement as the disorder was brought under control. Furthermore, military commanders had traditionally been indoctrinated with the view that knowledge of "the enemy" is an essential element of military planning and operations. By use of the term "enemy" I don't want to suggest that the military viewed this portion of the American people as the enemy. However there was a short-term problem with the military on one side and some people engaged in lawless acts on the other. Until that period of time ended, until the disorder was brought under control, the people on the other side were essentially the enemy.

Against this background, and with the peculiar visual acuity associated with hindsight, it is easy for me to see how things got out of hand. The hazard was perhaps nowhere as great as with the so-called "computerized data banks" which were created. These systems, filled with a lot of unevaluated "junk" information about individuals and incidents, had an enormous potential for abuse. I am reminded of an example of potential hazard which was well demonstrated by the Fort Holabird biographical data bank. When we had finally obtained a copy of the biographical data bank printout in the Pentagon--after being assured that no such compilation existed--one of my staff members in the Army General Counsel's office flipped through the listings. I cannot now recall the exact format of the biographical listings, but I do recall that they contained a form of ideological code associated with the individual. For example, the letter "Y" might stand for "anti-U.S. subversive." I recall that in looking at the entries for only surnames beginning with "A" and "B" we found the name of an outstanding Army Special Forces colonel and a major general who was a division commander, each accompanied by an ideological code which cast doubt on his loyalty to the United States. As best we could reconstruct what had happened, both of these men were on subscription lists for one of the antiwar underground newspapers which were then much in vogue. For all that appears, their names could have been put on the list involuntarily, or they could have subscribed in order to develop a better understanding of the antimilitary attitudes prevalent among many young people. In any event, based on such flimsy information as this, both of these

men had been assigned an adverse ideological code. It is not hard to conceive such a derogatory bit of information subsequently affecting the careers of the individuals involved, perhaps without their ever knowing of the damage which had occurred.

. . . .

Note. For a comprehensive view of the Privacy Act and the factors which led to its enactment see, Joyce, The Privacy Act: A Sword and a Shield but Sometimes Neither, 99 Mil. L. Rev. 113 (1983).

---

b. Congress was also concerned with the release by the government of personal information about American citizens. The Freedom of Information Act is not an effective guarantee of individual "informational" privacy because it places no restriction on the disclosure of records, it merely authorizes their withholding. Even though agencies have generally used the Act to deny the public access to personal information, it has not been viewed as a basis for restricting the inter-agency and inter-governmental transfer of information.

c. These concerns, along with others, provided the background for the Privacy Act. Early in 1974, both houses of Congress considered bills which formed the basis of the Act that eventually passed the Congress. Legislation was introduced in the Senate by Senator Sam J. Ervin, Jr., and in the House by Congressman William S. Moorhead. Two separate and divergent measures were passed by these bodies, but the differences were reconciled and Congress passed the Privacy Act in November 1974. It was signed into law by President Ford on the last day of the year and became effective in September 1975. It added section 552a to Title 5 of the United States Code. The Office of Management and Budget was given the responsibility of developing guidelines for federal agencies to follow in implementing the Act. The Act has been implemented by DOD Reg. 5400.11-R, Department of Defense Privacy Program (31 August 1983) and by the Department of the Army in Army Reg. No. 340-21, The Army Privacy Program (5 July 1985) [hereinafter cited as AR 340-21].

The underlying purpose of the Privacy Act is to give citizens more control over personal information collected by the Federal Government and how that information is used. The act accomplishes this in four basic ways. It seeks to establish sound information practices in the federal agencies and requires public notice of all systems of records. It requires that the information contained in these record systems be accurate, complete, relevant, and timely. It provides procedures whereby individuals can inspect and correct inaccuracies in almost all Federal records about themselves. Finally, it limits disclosure of records; requires agencies to keep an accurate accounting of disclosures; and, with certain exceptions, makes these disclosures available to the subject of the record. In the event that the statute is violated there are both criminal sanctions and civil remedies.

d. Notes and Discussion.

Note 1. Unlike the Freedom of Information Act, which applies to anyone making a request (foreign nationals as well as American citizens), the Privacy Act applies only to American citizens and aliens lawfully admitted for permanent residence.

Note 2. Do the Privacy Act's disclosure restrictions apply to the release of information about deceased personnel? It is the view of the DOD that the Privacy Act does not protect the records of deceased military personnel from disclosure. See Crumpton v. United States, 843 F. Supp. 751 (D.D.C. 1994) (no Privacy Act liability for disclosing records indexed only to name of deceased service member), aff'd on other grounds sub nom. Crumpton v. Stone, 59 F.3d 1400 (D.C. Cir. 1995). However, the FOIA might in some unusual circumstances allow withholding to protect the privacy of next-of-kin. See Defense Privacy Board Opinion 2; Badhwar v. United States Dep't of the Air Force, 829 F.2d 182 (D.C. Cir. 1987) (disclosure of autopsy reports might "shock the sensibilities of surviving kin").

Note 3. A corporation is not considered an "individual" or "person" for purposes of the Privacy Act. Cell Associates v. National Institute of Health, 579 F.2d 1155 (9th Cir. 1978). There is disagreement whether information about an individual in his entrepreneurial or business capacity, rather than personal capacity, is within the scope of the Privacy Act. OMB Guidelines suggest that entrepreneurial capacity is not covered by the Act. OMB Cir. No. A-108, 40 Fed. Reg. 28947, 28951 (1975). Accord Shermco v. Secretary of the Air Force, 425 F. Supp. 306 (N.D. Tex. 1978), rev'd on other grounds, 613 F.2d 1314 (5th Cir. 1980); Daniels v. FCC, N0. 77-5011 (D.S.D. March 15, 1978).

The Act itself makes no distinction whether the information about an individual pertains to personal or business activities. In interpreting the Act, several other district courts have examined and rejected the entrepreneurial distinction. Henke v. United States Dep't of Commerce, No. 94-0189, 1996 WL 692020 (D.D.C. Aug. 19,1994), aff'd on other grounds, 83 F.3d 1445 (D.C.Cir. 1996); Medadure Corp. v. United States, 490 F. Supp. 1368 (S.D.N.Y. 1980); Florida Medical Ass'n v. Dep't of HEW, 479 F. Supp. 1291 (M.D. Fla. 1979); Zeller v. United States, 467 F. Supp. 487 (E.D.N.Y. 1979). These courts take the better approach. OMB is expected to change its position when revised guidelines are published.

3.2 Records and System of Records.

a. The Privacy Act applies only to records and systems of records. It is therefore essential to know what is meant by record or system of records for the purpose of applying the Act. The Act defines record and system of records as follows:

> (4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and

criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

. . . .

---

b. The Office of Management and Budget guidelines explain more fully the definition of these terms in the Act.

Extract
Privacy Act Implementation, Guidelines and
Responsibilities, Office of Management and
Budget, 40 Fed. Reg.28947 (1975)
[hereinafter cited as Privacy Act Guidelines]

. . . .

Record.--The term "record", as defined for purposes of the Act, means a tangible or documentary record (as opposed to a record contained in someone's memory) and has a broader meaning than the term commonly has when used in connection with record-keeping systems. A "record" means any item of information about an individual that includes an individual identifier. The term was defined "to assure the intent that a record can include as little as one descriptive item about an individual." (Congressional Record, p. S21818, December 17, 1974 and p. H12246, December 18, 1974).

System of Records. The definition of "system of records" limits the applicability of some of the provisions of the Act to "records" which are maintained by an agency, retrieved by individual identifier (i.e., there is an indexing or retrieval capability using identifying particulars, as discussed above, built into the system), and the agency does, in fact, retrieve records about individuals by reference to some personal identifier.

A system of records for purposes of the Act must meet all of the following three criteria:

It must consist of records. See discussions of "record" (a)(4), above.

It must be "under the control of" an agency.

It must consist of records retrieved by reference to an individual name or some other personal identifier.

The phrase ". . . under the control of any agency . . ." was intended to accomplish two separate purposes: (1) To determine possession and establish

accountability; and (2) to separate agency records from records which are maintained personally by employees of an agency but which are not agency records.

The phrase ". . . under the control of any agency . . ." in the definition of "system of records". . .was intended to assign responsibility to a particular agency to discharge the obligations established by the Privacy Act. An agency is responsible for those systems which are ". . . under the control of" that agency.

The second purpose of the phrase was to distinguish "agency records" from those records which, although in the physical possession of agency employees and used by them in performing official functions, were not considered "agency records." Uncirculated personal notes, papers and records which are retained or discarded at the author's discretion and over which the agency exercises no control or dominion (e.g., personal telephone lists) are not considered to be agency records within the meaning of the Privacy Act. This distinction is embodied, in part, in the phrase "under the control of" an agency as well as in the definition of "record" (5 U.S.C. § 552(a)(4)).

An agency shall not classify records, which are controlled and maintained by it, as non-agency records, in order to avoid publishing notices of their existence, prevent access by the individuals to whom they pertain, or otherwise evade the requirements of the act.

The "are retrieved by" criterion implies that the grouping of records under the control of an agency is accessed by the agency by use of a personal identifier; not merely that a capability or potential for retrieval exists. For example, an agency record-keeping system on firms it regulates may contain "records" (i.e., personal information) about officers of the firm incident to evaluating the firm's performance. Even though these are clearly "records" under the control of an agency, they would not be considered part of a system as defined by the Act unless the agency accessed them by reference to a personal identifier (name, etc.). That is, if these hypothetical "records" are never retrieved except by reference to company identifier or some other nonpersonal indexing scheme (e.g., type of firm) they are not a part of a system of records.

Considerable latitude is left to the agency in defining the scope or grouping of records which constitute a system. Conceivably all the "records" for a particular program can be considered a single system or the agency may consider it appropriate to segment a system by function or geographic unit and treat each segment as a "system".

. . . .

Supplementary Guidance, Office of Management and Budget, 40 Fed. Reg. 56741 (1975)

1. Definition of System of Records (5 U.S.C. § 552a(a)(5)). On page 28952, third column, after line 27, add:

"Following are several examples of the use of the term 'system of records':

"Telephone directories. Agency telephone directories are typically derived from files (e.g., locator cards) which are, themselves, systems of records. For example, agency personnel records may be used to produce a telephone directory which is distributed to personnel of the agency and may be made available to the public pursuant to 5 U.S.C. §§ 552a(b) (1) and (2), (intra-agency and public disclosure, respectively). In this case the directory could be a disclosure from the system of records and, thus, would not be a separate system. On the other hand, a separate directory system would be a system of records if it contains personal information. A telephone directory, in this context, is a list of names, titles, addresses, telephone numbers, and organizational designations. An agency should not utilize this distinction to avoid the requirements of the Act including the requirement to report the existence of systems of records which it maintains.

"Mailing lists. Whether or not a mailing list is a system of records depends on whether the agency keeps the list as a separate system. Mailing lists derived from records compiled for other purposes (e.g., licensing) could be considered disclosures from that system and would not be systems of records. If the system from which the list is produced is a system of records, the decision on the disclosability of the list would have to be made in terms of subsection (b) (conditions of disclosure) and subsection (n) (the sale or rental of mailing lists). A mailing list may, in some instances, be a stand-alone system (e.g., subscription lists) and could be a system of records subject to the Act if the list is maintained separately by the agency, it consists of records (i.e., contains personal information), and information is retrieved by reference to name or some other identifying particular.

"Libraries. Standard bibliographic materials maintained in agency libraries such as library indexes, Who's Who Volumes and similar materials are not considered to be systems of records. This is <u>not</u> to suggest that all published material is, by virtue of that fact, not subject to the Act. Collections of newspaper clippings or other published matter about an individual maintained other than in a conventional reference library would normally be a system of records."

---

c. Congress wanted to prevent Federal agencies from maintaining secret systems of records. As originally enacted, the Privacy Act required each agency to publish annually in the Federal Register notice of the existence of each system of records that it maintained. The Congressional Reports Elimination Act of 1982 amended the Privacy Act to require public notice only "upon the establishment or revision" of a system of records. Additionally, agencies must give advanced notice to Congress and OMB prior to establishing or altering a system of records. Army rules governing the publication of systems notices are at AR 340-21, para. 4-6. A criminal penalty applies to the willful maintenance of a "system of records" without publishing the required notice.

d. Notes and Discussion.

Note 1. Is a commander's or supervisor's notebook containing personal information about members of his command or office a system of records for purposes of the Privacy Act? It does not seem to meet two of the three fundamental criteria of the Office of Management and Budget (while it could be a "record," it is not in the agency's control and it is not retrieved by a name or personal identifier). A commander's notebook which serves merely as an extension of memory is not a system of records. The other characteristics of a commander's notebook that remove it from the system of records for purposes of the Privacy Act include: 1) the commander creates or destroys the notes at his or her sole discretion, (2) the commander neither shares the notes with others, nor does the commander pass these notes to a successor; and (3) the commander does not explicitly refer to these personal notes in official documents (incorporate by reference). See also Chapman v. NASA, 682 F.2d 526 (5th Cir. 1982); Kalmin v. Dep't of Navy, 605 F. Supp. 1492 (D.D.C. 1985); Thompson v. Dep't of Transportation, 547 F. Supp. 274 (S.D. Fla. 1982).

Note 2. Is a unit roster a system of records?

Note 3. How does the Privacy Act affect court-martial proceedings? See Defense Privacy Board Opinion 32.

Note 4. When the government contracts for the operation of a system of records, it is required to apply the requirements of the Privacy Act to the contractor. 5 U.S.C. § 552a(m); AR 340-21, para. 4-8. An early GAO report found that federal contractors often failed to meet their responsibilities under the Privacy Act, GAO Report LCD-78-224, Nov. 27, 1978.

3.3 Access, Amendment, and Judicial Review.

a. The Privacy Act requires that individuals be given access to records pertaining to them which are contained in systems of records. Copies of records must be furnished individuals upon request. Similarly, individuals are entitled to request amendment of records which they contend are not accurate, relevant, timely, or complete. If an agency refuses to amend a record, the individual concerned is entitled to file a statement disagreeing with the agency's refusal and to have it included with the record. The straightforward restriction on

access to records is a provision which states that the Privacy Act does not grant an individual access to information compiled in reasonable anticipation of a civil action. 5 U.S.C. § 552a(d)(5). Agencies may also establish special procedures for the release of an individual's medical and psychological records to him. 5 U.S.C. § 552a(f)(3). However, the Department of Justice's "special procedures" that permitted the individual's physician to determine whether he could have access were struck down in Benavides v. United States Bureau of Prisons, 995 F.2d 269 (D.C. Cir. 1993). The court held that a "regulation that expressly contemplates that the requesting individual may *never* see certain medical records [as a result of the discretion of physician designated by the inmate] is simply not a special procedure for disclosure by that person." The procedures for obtaining access to and amendment of records are contained in chapter 2 of AR 340-21. Agency heads may exempt certain records from various provisions of the Privacy Act, including the access and amendment provisions. Records which are properly classified, certain investigatory records, and certain testing and examination material are examples of the types of records which may be exempted. 5 U.S.C. §§ 552a(j) and (k).

Note. The Army has taken the position that amendment of a record which is allegedly inaccurate can be accomplished under the Privacy Act only if it is claimed that the record is factually inaccurate (as opposed to reflecting an inaccurate judgment). For example, the judgment of a rating official cannot be amended under the Privacy Act. AR 340-21, para. 2-10a. See Hewitt v. Grabicki, 596 F. Supp. 297 (E.D. Wash. 1984); Turner v. Dep't of Army, 447 F. Supp. 1207 (D.D.C. 1978), aff'd, 593 F.2d 1372 (D.C. Cir. 1979).

b. In some instances under the Privacy Act an agency may exempt a system of records (or a portion thereof) from access by individuals in accordance with the general or specific exemptions (subsection (j) or (k)); or deny a request for access to records compiled in reasonable anticipation of a civil action (subsection (d)(5)). See AR 340-21, ch. 5.

(1) General exemptions.

The general exemptions apply only to the Central Intelligence Agency and criminal law enforcement agencies. The records held by these agencies can be exempt from more provisions of the act than those maintained by other agencies. However, even the systems of these agencies are subject to many of the act's basic provisions: (1) the existence and characteristics of all record systems must be publicly reported; (2) subject to specified exceptions, no personal records can be disclosed to other agencies or persons without the prior consent of the individual to whom the record pertains; (3) all disclosures must be accurately accounted for; (4) records which are disclosed must be accurate, relevant, up-to-date, and complete; and (5) no records describing how an individual exercises his first amendment rights can be maintained unless such maintenance is authorized by statute or by the individual to whom it pertains or unless it is relevant to and within the scope of an authorized law enforcement activity.

General exemptions are referred to as (j) (1) and (j) (2) in accordance with their designations in the act.

Exemption (j) (1): Files maintained by the CIA.--Exemption (j) (1) covers records "maintained by the Central Intelligence Agency." This exemption permits the head of the Central Intelligence Agency to exclude certain systems of records within the agency from many of the Act's requirements. The provisions from which the systems can be exempted are primarily those permitting individual access. Congress permitted the exemption of these records from access because CIA files often contain highly sensitive information regarding national security.

Exemption (j) (2): Files maintained by Federal criminal law enforcement agencies.--Exemption (j) (2) covers records "maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision."

This exemption permits the Attorney General to exclude criminal justice systems of records of the Department of Justice from many of the Act's requirements. It also permits the heads of other agencies which have criminal law enforcement components (e.g. IG and CID) to exclude their criminal justice systems of records.

(2) Specific exemptions.

There are seven specific exemptions which apply to all agencies. Under specified circumstances, agency heads are permitted to exclude certain record systems from the access and amendment provisions of the Act. However, even exempted systems are subject to many of the Act's requirements. In addition to the provisions listed under General Exemptions (which apply to all record systems), a record system that falls under any one of the seven specific exemptions (listed below) is subject to the following requirements: (1) information that might be used to deny a person a right, benefit, or privilege must, whenever possible, be collected directly from the individual; (2) individuals asked to supply information must be informed of the authority for collecting it, the purposes to which it will be put, and whether or not the imparting of it is voluntary or mandatory; (3) individuals must be notified when records concerning them are disclosed in accordance with a compulsory legal process, such as a court subpoena; (4) agencies must notify persons or agencies who have previously received information about an individual of any corrections or disputes over the accuracy of the information; (5) and all records must be accurate, relevant, up-to-date, and complete.

Record systems which fall within the seven exempt categories are subject to the civil remedies provisions of the Act. Therefore, if an agency denies access to a record in an exempt record system or refuses to amend a record in accordance with a request, the requester can contest these actions in court. A person can also bring suit for damages against the agency if he has been denied a right, benefit, or privilege as a result of records which have been improperly maintained. These remedies are not available under the general exemptions.

Specific exemptions are referred to as (k) (l), (k) (2), etc., in accordance with their designations in the Act.

Exemption (k) (1): Classified documents concerning national defense and foreign policy.--Exemption (k) (1) covers records "subject to the provisions of section 552(b) (1) of this title."

This refers to the first exemption of the Freedom of Information Act that excepts from disclosure records "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order."

Exemption (k) (2): Investigatory material compiled for law enforcement purposes.--Exemption (k) (2) pertains to "investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j) (2) of this section: Provided, however, that if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence."

This applies to investigatory materials compiled for law enforcement purposes by agencies whose principal function is other than criminal law enforcement. Included are such items as files maintained by the Internal Revenue Service concerning taxpayers who are delinquent in filing Federal tax returns, investigatory reports of the Federal Deposit Insurance Corporation regarding banking irregularities, and files maintained by the Securities Exchange Commission on individuals who are being investigated by the agency.

The decision in Viotti v. United States Air Force, 902 F. Supp. 1331 (D.Colo. 1995), contains a detailed discussion of exemption (k)(2) in the context of an IG "report of inquiry" resulting in a colonel's forced early retirement which the court found to be a loss of a benefit. The court there also held that "the 'express promise requirement" of exemption (k)(2) was not satisfied where a witness "merely expressed a 'fear of reprisal.'"

Exemption (k) (3): Secret Service intelligence files.--Exemption (k) (3) covers records "maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18."

This exemption pertains to files held by the Secret Service that are necessary to insure that safety of the President and other individuals under Secret Service protection.

Exemption (k) (4): Files used solely for statistical purpose.--Exemption (k) (4) applies to records "required by statute to be maintained and used solely as statistical records."

This includes such items as Internal Revenue Services files regarding the income of selected individuals used in computing national income averages, and records on births and deaths maintained by the Department of Health and Human Services for compiling vital statistics.

Exemption (k) (5): Investigatory material used in making decisions concerning Federal employment, military service, Federal contracts, and security clearances.--Exemption (k) (5) relates to "investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence."

The Court of Appeals for the D.C. Circuit has held that exemption (k) (5) is also applicable to source-identifying material compiled for determining eligibility for federal grants, stating that "the term 'Federal contracts' in Privacy Act exemption (k) (5) encompasses a federal grant agreement if the grant agreement includes the essential elements of a contract and establishes a contractual relationship between the government and the grantee." Henkie v. United States Dep't of Commerce, 83 F.3d 1445 (D.C. Cir. 1996).

Exemption (k)(5) is not limited to initial hiring decisions, it also applies to investigations concerning whether an individual is suitable for continued employment. Hernandez v. Alexander, 671 F.2d 402 (10th Cir. 1982).

This exemption applies only to investigatory records which would reveal the identity of a confidential source. Since it should not be customary for agencies to grant pledges of confidentiality in collecting information concerning employment, Federal contracts, and security clearances, in most instances these records would be available.

Exemption (k) (6): Testing or examination material used solely for employment purposes.--Exemption (k) (6) covers "testing or examination material used solely to determine

individual qualifications for appointment or promotion in the Federal service the disclosure of which would compromise the objectivity or fairness of the testing or examination process."

This provision permits agencies to withhold information concerning the testing process that would give an individual an unfair competitive advantage. It applies solely to information that would reveal test questions and answers or testing procedures.

Exemption (k) (7): Evaluation material used in making decisions regarding promotions in the armed services.--Exemption (k) (7) pertains to "evaluation material used to determine potential for promotion in the armed services, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence."

For a case involving the Air Force's use of confidential evaluations of senior officers, see May v. Department of Air Force, 777 F.2d 1012 (5th Cir. 1985) (denial of access under subsection (k)(7) upheld).

(3) Materials compiled in reasonable anticipation of civil litigation.

Extract
DOD Privacy Review Board
Policy Guidance on Release/
Disclosure of Information Under
the Privacy Act
(HQDA Ltr. 340-77-4, 17 Jan. 1977)

. . . .

> Section (d) (5) of the Privacy Act specifically denies authority for individuals to have access to any information compiled in reasonable anticipation of a civil action or proceeding. Therefore, not only is an attorney's "work product" protected from access but other information which is not routinely released but is compiled in reasonable anticipation of litigation is protected. Once "work product" is prepared in reasonable anticipation of litigation, section (d)(5) would continue to protect the material regardless of whether litigation is instituted, completed or dropped.
>
> The determination as to whether material is prepared in anticipation of litigation must be made on an ad hoc basis for each document in question. In making this determination, all circumstances must be considered including the intent of the author at the time the document was prepared.

. . . .

Unlike the general and specific exemptions, section (d)(5) is self-executing and does not depend on implementing agency regulations. Smiertka v. IRS, 447 F. Supp. 221 (D.D.C. 1978).

c. What is the relationship between the Privacy Act and the Freedom of Information Act concerning requests from individuals for their own records? The Privacy Act provides that if a record is exempt from release under FOIA but accessible under the Privacy Act, the individual subject of the record is clearly entitled to access. FOIA exemptions cannot be used to withhold information under the Privacy Act. 5 U.S.C. § 552a(t)(1).

A more difficult case arises when the record is exempt from access under the Privacy Act but apparently releasable under FOIA. The Fifth and Seventh Circuits have held that the information is not releasable. Painter v. FBI, 615 F.2d 689 (5th Cir. 1980); Terkel v. Kelly, 599 F.2d 214 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). The rationale supporting the denial of access was that the statutes must be read together. Congress could not have intended to deny access to the individual under the Privacy Act and yet release the same information to the general public under FOIA. To avoid this anomaly, the courts held that the Privacy Act falls within FOIA Exemption (b)(3).

A split was created between the circuits when the District of Columbia and Third Circuits held that the Privacy Act was not an Exemption (b)(3) statute under FOIA. Porter v. Department of Justice, 717 F.2d 787 (3d Cir. 1983); Greentree v. Customs Serv., 674 F.2d 74 (D.C. Cir. 1982). These courts found that the respective exemptions under the two statutes differ in purpose and therefore in scope. Additionally, the courts did not believe that Congress intended for the Privacy Act to close existing avenues of access under FOIA but rather to give the individual the cumulative access rights under both statutes.

The Supreme Court agreed to settle the split. Shapiro v. Drug Enforcement Admin., 721 F.2d 215 (7th Cir. 1983), cert. granted, 466 U.S. 926 (1984); Provenzano v. Department of Justice, 717 F.2d 799 (3d Cir. 1983), cert. granted, 466 U.S. 926 (1984). Before arguments were heard in the cases, however, Congress resolved the issue. The Privacy Act was amended to state that the Act is not a FOIA Exemption (b)(3) statute. Section 2(c), PL 98-477, 98 Stat. 2209 (codified at what is now 5 USC § 552a(t)(2)). This amendment is consistent with existing Army policy. See AR 25-55, paragraphs 1-301b and 1-503; AR 340-21, paragraph 2-3. The circuit court judgments in Shapiro and Provenzano were subsequently vacated and remanded. 469 U.S. 14 (1984). Therefore, the subjects of records within a system of records are entitled to the cumulative access rights provided by both statutes.

d. Access and Amendment Time Limits.

(1) Access to Records (AR 340-21, paras. 2-2 and 2-9).

(a) Official receiving request must acknowledge receipt within 10 working days.

(b) Official granting request must release the records within 30 working days.

(c) Official believing request should be denied must send request to Access & Amendment Refusal Authority within 5 working days and notify individual of the referral.

(d) Access & Amendment Refusal Authority denying access must, within 30 working days, notify individual and advise him of appeal rights. Requesters have 60 calendar days to appeal.

(2) Amendment of Records (5 U.S.C. § 552a(d) and AR 340-21, para. 2-11).

(a) Official receiving request for amendment will acknowledge receipt within 10 working days.

(b) Official deciding amendment is not justified must forward to Access & Amendment Refusal Authority within 5 working days and notify the requester of the referral.

(c) Official making correction should advise the individual within 30 days of his request.

(d) Access & Amendment Refusal Authority receiving appeal must forward it to DA Privacy Review Board within 5 working days.

(e) DA Privacy Review Board will take action on an appeal within 30 working days.

e. An agency's final denial of access to or refusal of amendment of an individual's record gives rise to a right to obtain a de novo review of the agency's decision in federal district court. In addition, if an agency fails to maintain records in a manner which insures fairness, and as a result some determination is made which is adverse to the individual, he may sue the agency. Finally, an agency may be sued if it fails to comply with any provision of the Privacy Act or rule promulgated pursuant thereto, resulting in an adverse effect upon an individual. If in the latter two cases the agency's action is found to be intentional or willful, the individual is entitled to recover actual damages from the United States, but in no event less than $1,000. 5 U.S.C. § 552a(g).

f. Notes and Discussion.

Note 1. An individual must exhaust administrative remedies within the agency in access and amendment cases before pursuing judicial relief under the Privacy Act. See, e.g., Quinn v. Stone, 978 F.2d 126 (3d Cir. 1992).

Note 2. An individual may be "collaterally estopped" from pursuing a judicial remedy under the Privacy Act where he has previously litigated substantially the same issue in a non-Privacy Act action. Douglas v. Agricultural Stabilization & Conservation Serv., 33 F.3d 784 (7th Cir. 1994).

Note 3. For violations of its provisions the Privacy Act provides two remedies: civil suit against the offending federal agency and criminal penalties against the offending official. The only published decision concerning a criminal violation of the Privacy Act, United States v. Trabert, 978 F. Supp. 1368 (D.Colo. 1997), resulted in a finding of not guilty based on the prosecution's failure to prove beyond a reasonable doubt that the defendant (a DA civilian) had "willfully" disclosed protected material. With respect to civil actions, the only court of appeals to address the issue has held that the Privacy Act "does not limit the remedial rights of persons to pursue whatever remedies they may have under the [Federal Tort Claims Act]" for privacy violations consisting of record disclosures. See O'Donnell v. United States, 891 F.2d 1079 (3d Cir. 1989). Six district courts, however, have held that the Privacy Act's remedies preclude an action against individual employees for damages under the Constitution in a Bivens suit. See Sullivan v. USPS, 944 F.Supp. 191(W.D.N.Y. 1996); Hughley v. Federal Bureau of Prisons, No. 94-1048 (D.D.C. Apr. 30, 1996), aff'd sub nom, Hughley v. Hawks, No. 96-5159, 1997 WL 362725 (D.C. Cir May 6, 1997); Blazy v. Woolsey, No. 93-2424, 1996 WL 43554 (D.D.C. Jan 31, 1996); Williams v. VA, 879 F. Supp. 578 (E.D. Va. 1995); Mangino v. Department of the Army, No. 90-2067, 1994 WL 477260 (D. Kan. Aug. 24, 1994); Mittleman v. United States Treasury, 773 F. Supp. 442 (D.D.C. 1991).

3.4 Collection and Maintenance of Information.

a. The Privacy Act contains several substantive requirements concerning the collection and maintenance of information.

(1) The first requirement is that each agency maintain only "such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order. . . ." 5 U.S.C. § 552a(e)(1). The OMB Guidelines explain this provision.

Extract
Privacy Act Guidelines at 28960

. . . .

A key objective of the Act is to reduce the amount of personal information collected by Federal agencies to reduce the risk of intentionally or inadvertently improper use of personal data. In simplest terms, information not collected about an individual cannot be misused. The Act recognizes, however, that agencies need to maintain information about individuals to discharge their responsibility effectively.

Agencies can derive authority to collect information about individuals in one of two ways:

By the Constitution, a statute, or Executive order explicitly authorizing or directing the maintenance of a system of records; e.g., the Constitution and title 13 of the United States Code with respect to the Census.

By the Constitution, a statute, or Executive order authorizing or directing the agency to perform a function, the discharging of which requires the maintenance of a system of records.

Each agency shall, with respect to each system of records which it maintains or proposes to maintain, identify the specific provision in law which authorizes that activity. The authority to maintain a system of records does not give the agency the authority to maintain any information which it deems useful. Agencies shall review the nature of the information which they maintain in their systems of records to assure that it is, in fact, "relevant and necessary".

. . . .

---

(2) The second requirement of the Act is that agencies "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. § 552a(e)(7). First Amendment rights include, but are not limited to religious and political beliefs, freedom of speech and of the press, and freedom of assembly and petition.

Examples of statutes which authorize the collection of information regarding First Amendment activity are the Immigration and Naturalization Act, which makes the possibility of religious or political persecution relevant to a stay of deportation, and the Ethics in Government Act.

There are many examples of situations in which an individual can authorize the collection of information regarding the exercise of First Amendment rights, e.g., a member of the armed forces may indicate a religious preference so that, if seriously injured or killed while on duty, the proper clergyman can be called. The individual may also volunteer such information and if he does so, the agency is not precluded from accepting and retaining it if it is relevant and necessary to accomplish an agency purpose. Thus, if an applicant for political appointment should list his political affiliation, association memberships, and religious activities,

the agency may retain this as part of his application file or include it in an official biography. Similarly, if an individual volunteers information on civic or religious activities in order to enhance his chances of receiving a benefit, such as clemency, the agency may consider information thus volunteered. However, nothing in the request for information should in any way suggest that information on an individual's First Amendment activities is required.

In the discussions on the floor of the House regarding the authority to maintain such records for law enforcement purposes, it was stated that the objective of the law enforcement qualification on the general prohibition was "to make certain that political and religious activities are not used as a cover for illegal or subversive activities." However, it was agreed that "no file would be kept of persons who are merely exercising their constitutional rights . . ." and that in accepting this qualification "there was no intention to interfere with First Amendment rights" (Congressional Record, November 20, 1974, H10892 and November 21, 1974, H10952). For a judicial interpretation of the scope of the law enforcement exception see Patterson v. FBI, 893 F.2d 595 (3d Cir. 1990).

(3) The Privacy Act requires federal departments and agencies to "collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. . . ." 5 U.S.C. § 552a(e)(2).

Extract
Privacy Act Guidelines at 28961

. . . .

> This provision stems from a concern that individuals may be denied benefits, or that other adverse determinations affecting them may be made by Federal agencies on the basis of information obtained from third party sources which could be erroneous, outdated, irrelevant, or biased. This provision establishes the requirement that decisions under Federal programs which affect an individual should be made on the basis of information supplied by that individual for the purpose of making those determinations but recognizes the practical limitations on this by qualifying the requirement with the words "to the extent practicable."

. . . .

Examples of practical considerations which permit the collection of information from third parties are listed in AR 340-21, para. 4-1d.

(4) When asked to supply information to a federal department or agency, an individual must be advised of certain matters under the Privacy Act. 5 U.S.C. § 552a(e)(3).

When personal information will become part of a system of records, AR 340-21, para. 4-2, requires the individual be notified of the following:

(a) The authority for requesting disclosure.

(b) The principal purpose or purposes for which the information is to be used.

(c) The routine uses to be made of the information.

(d) Whether furnishing the information is mandatory or voluntary.

(e) The effects on the individual, if any, of not providing all or any part of the information.

The term "routine use" is defined in 5 U.S.C. § 552a(a)(7) and AR 340-21, glossary.

(5) An agency must maintain records used to make determinations about individuals with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness in the determination. § 552a(e)(5).

b. Notes and Discussion.

Note 1. A Privacy Act statement is required when information is obtained from third party sources. Saunders v. Schweiker, 508 F. Supp. 305 (W.D.N.Y. 1981). See AR 340-21, para. 4-2a.

Note 2. If furnishing the information is mandatory, the Privacy Act warning does not have to give notice of any specific criminal penalty that could be imposed for refusal to provide the information. United States v. Bressler, 772 F.2d 287 (7th Cir. 1985).

Note 3. Must a chaplain give a Privacy Act warning before collecting information from the church congregation?

CHAPTER 4

GOVERNMENT DISCLOSURE OF PERSONAL INFORMATION

4.1 General Rule.

As a general rule, no agency can "disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . . ." 5 U.S.C. § 552a(b). There are 12 exceptions to this prohibition.

4.2 Disclosure Within the Agency. 5 U.S.C. § 552a(b)(1).

a. Many of the exceptions to the disclosure prohibition are important to permit the ordinary day-to-day operations of the military departments as well as other federal departments and agencies. One of the more important of these is Exception 1 which permits disclosure of a record from a system of records "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." 5 U.S.C. § 552a(b)(1).

b. This exception is explained more fully in the Office of Management and Budget guidelines.

Extract
Privacy Act Guidelines at 28954

. . . .

Disclosure within the Agency. Subsection (b)(l) "To those offices and employees of the agency which maintains the record who have a need for the record in the performance of their duties;"

This provision is based on a "need to know" concept. See also definition of "agency," (a)(l). It is recognized that agency personnel require access to records to discharge their duties. In discussing the conditions of disclosure provision generally, the House Committee said that "it is not the Committee's intent to impede the orderly conduct of government or delay services performed in the interests of the individual. Under the conditional disclosure provisions of the bill, 'routine' transfers will be permitted without the necessity of prior written consent. . . .

This discussion suggests that some constraints on the transfer of records within the agency were intended irrespective of the definition of agency. Minimally, the recipient officer or employee must have an official

"need to know." The language would also seem to imply that the use should be generally related to the purpose for which the record is maintained.

Movement of records between personnel of different agencies may in some instances be viewed as intra-agency disclosures if that movement is in connection with an inter-agency support agreement. For example, the payroll records compiled by Agency A to support Agency B in a cross-service arrangement are, arguably, being maintained by Agency A as if it were an employee of Agency B. While such transfers would meet the criteria both for intra-agency disclosure and "routine use," they should be treated as intra-agency disclosure for purposes of the accounting requirements (e)(l). In this case, however, Agency B would remain responsible and liable for the maintenance of such records in conformance with the Act.

It should be noted that the conditions of disclosure language makes no specific provision for disclosures expressly required by law other than 5 U.S.C. § 552. Such disclosures, which are in effect congressionally-mandated "routine uses," should still be established as "routine uses" pursuant to subsections (e)(11) and (e)(4)(D). This is not to suggest that a "routine use" must be specifically prescribed in law.

. . . . .

---

c. Notes and Discussion.

Note 1. The Department of Defense is considered a single agency for purposes of this exception. DOD Reg. No. 5400.11-R, ch. 4, paras. A2 & B1 (31 August 1983). See AR 340-21, para. 3-1a.

Note 2. Would a defense counsel's request for the personnel files of prospective prosecution witnesses and court members fall within this exception? Although there are no reported judicial decisions on point, in one case, a military dependent alleged that an Air Force psychologist violated the Privacy Act by disclosing treatment records about her to the military defense counsel for an Army general officer facing court-martial charges in connection with his extra-marital affair with the dependent. The government settled the case in which it paid the dependent $67,500 and provided her a "statement of regret" signed by the Deputy Chief of Staff for Personnel. See, Madden v. DOD, No. 98-2857 (D.D.C. June 15, 1999).

Note 3. For a detailed analysis of the need to know requirement and its legislative history, see Parks v. IRS, 618 F.2d 677 (10th Cir. 1980).

4.3 Information Required to be Disclosed by the Freedom of Information Act. 5 U.S.C. § 552a(b)(2).

a. The Privacy Act was designed to be consistent with the Freedom of Information Act. Hence, a major exception to the disclosure prohibition above is the disclosure of information from a system of records when such disclosure is required by the Freedom of Information Act.

Extract
Privacy Act Guidelines at 28954

. . . .

Disclosure to the Public. Subsection (b)(2) "Required under section 552 of this title;" Subsection (b)(2) is intended "to preserve the status quo as interpreted by the courts regarding the disclosure of personal information" to the public under the Freedom of Information Act (Congressional Record p. S21817, December 17, 1974 and p. H12244, December 18, 1974). It absolves the agency of any obligation to obtain the consent of an individual before disclosing a record about him or her to a member of the public to whom the agency is required to disclose such information under the Freedom of Information Act and permits an agency to withhold a record about an individual from a member of the public only to the extent that it is permitted to do so under 552(b). Given the use of the term "required", agencies may not voluntarily make public any record which they are not required to release (i.e., those that they are permitted to withhold) without the consent of the individual unless that disclosure is permitted under one of the other portions of this subsection.

. . . .

---

b. The question then becomes: "What information must be released under the Freedom of Information Act?" The answer is: "All recorded information which is not exempt from release under the FOIA." Information contained in a "system of records" may be exempt from release to the public under one or more of the exemptions discussed in Chapter 2 of this casebook. Generally, however, information contained in systems of records will be exempt from release to the public (if it is exempt from release at all) under Exemption 6 or 7(c) of the FOIA. As noted in the Privacy Act Guidelines, if the information is exempt from release under the FOIA, the Privacy Act prohibits the agency from disclosing it except in accordance with the terms of the Privacy Act. To put it another way, the Privacy Act removes any discretion an agency would otherwise have to disclose to the public information which is exempt from release under the FOIA. For an example of the Supreme Court applying this analysis, see DOD v. FLRA, 510 U.S. 487 (1994).

c. Exemption 6 of the Freedom of Information Act provides that the FOIA does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The Supreme Court has addressed the meaning of this exemption.

Department of the Air Force v. Rose
425 U.S. 352 (1976)

[The facts of this case are set forth in paragraph 2.2 of this casebook.]
[Most footnotes omitted]

. . . .

Additional questions are involved in the determination whether Exemption 6 exempts the case summaries from mandatory disclosure as "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The first question is whether the clause "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" modifies "personnel and medical files" or only "similar files." The Agency argues that Exemption 6 distinguishes "personnel" from "similar" files, exempting all "personnel files" but only those "similar files" whose disclosure constitutes "a clearly unwarranted invasion of personal privacy," and that the case summaries sought here are "personnel files." On this reading, if it is determined that the case summaries are "personnel files," the Agency argues that judicial inquiry is at an end, and that the Court of Appeals therefore erred in remanding for determination whether disclosure after redaction would constitute "a clearly unwarranted invasion of personal privacy."

The Agency did not argue its suggested distinction between "personnel" and "similar" files to either the District Court or the Court of Appeals, and the opinions of both courts treat Exemption 6 as making no distinction between "personnel" and "similar" files in the application of the "clearly unwarranted invasion of personal privacy" requirement. The District Court held that "it is only the identifying connection to the individual that casts the personnel, medical, and similar files within the protection of the sixth exemption." Petition for Certiorari, at 31A. The Court of Appeals stated, "We are dealing here with 'personnel' or 'similar' files. But the key words, of course, are 'a clearly unwarranted invasion of personal privacy' . . . ." 495 F.2d, at 266.

We agree with these views, for we find nothing in the wording of Exemption 6 or its legislative history to support the Agency's claim that Congress created a blanket exemption for personnel files. Judicial

interpretation has uniformly reflected the view that no reason would exist for nondisclosure in the absence of a showing of a clearly unwarranted invasion of privacy, whether the documents are filed in "personnel" or "similar" files. See, e.g., Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 135 (CA3 1974); Rural Housing Alliance v. Department of Agriculture, 162 U.S. App. D.C., 122, 126, 498 F.2d 73, 77 (1974); Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820 (1973); Getman v. NLRB, 146 U.S. App. D.C. 209, 213, 450 F.2d 670, 674 (1971). Congressional concern for the protection of the kind of confidential personal data usually included in a personnel file is abundantly clear. But Congress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by the Agency in "personnel" files. Rather, Congress sought to construct an exemption that would require a balancing of the individual's right of privacy against the preservation of the basic purpose of the Freedom of Information Act "to open agency action to the light of public scrutiny." The device adopted to achieve that balance was the limited exemption, where privacy was threatened, for "clearly unwarranted" invasions of personal privacy.

Both House and Senate Reports can only be read as disclosing a congressional purpose to eschew a blanket exemption for "personnel . . . and similar files" and to require a balancing of interests in either case. Thus the House Report states, H.R. Rep. No. 1497, p. 11, "The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information by excluding those kinds of files the disclosure of which might harm the individual." Similarly, the Senate Report, S. Rep. No. 813, p. 9, states, "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interest between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." Plainly Congress did not itself strike the balance as to "personnel files" and confine the Courts to striking the balance only as to "similar files." To the contrary, Congress enunciated a single policy, to be enforced in both cases by the courts, "that will involve a balancing" of the private and public interests. This was the conclusion of the Court of Appeals of the District of Columbia Circuit as to medical files, and that conclusion is equally applicable to personnel files:

> "Exemption 6 of the Act covers '. . . medical files . . . the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' Where a purely medical file is withheld under authority of Exemption 6, it will be for the District Court ultimately to determine any dispute as to whether that exemption was properly invoked." Ackerly v.

> Ley, 137 U.S. App. D.C. 133, 136-137, n. 3, 420 F.2d 1336, 1339-1340, n. 3 (1969) (ellipsis in original).

See also Wine Hobby USA, Inc. v. IRS, supra at 135.

> Congress' recent action in amending the Freedom of Information Act to make explicit its agreement with judicial decisions requiring the disclosure of nonexempt portions of otherwise exempt files is consistent with this conclusion. Thus, § 552(b) . . . now provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." And § 552(a)(4)(B) was added explicitly to authorize in camera inspection of matter claimed to be exempt "to determine whether such records or any part thereof shall be withheld." (Emphasis supplied.) The Senate Report accompanying this legislation explains, without distinguishing "personnel and medical files" from "similar files," that its effect is to require courts
>
> > "to look beneath the label on a file or record when the withholding of information is challenged. . . . [W]here files are involved [courts will] have to examine the records themselves and require disclosure of portions to which the purposes of the exemption under which they are withheld does not apply." S. Rep. No. 93-854, p. 32 (1974).

The remarks of Senator Kennedy, a principal sponsor of the amendments, make the matter even clearer.

> > "For example, deletion of names and identifying characteristics of individuals would in some cases serve the underlying purpose of exemption 6, which exempts 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.'" 120 Cong. Rec. 17018.

> In so specifying, Congress confirmed what had perhaps been only less clear earlier. For the Senate and House Reports on the Bill enacted in 1966 noted specifically that Health, Education, and Welfare files, Selective Service files, or Veterans' Administration files, which as the Agency here recognizes were clearly included within the congressional conception of "personnel files," were nevertheless intended to be subject to mandatory disclosure in redacted form if privacy could be sufficiently protected. As the House Report states, H.R. Rep. No. 1497, p. 11, "The exemption is also intended to cover detailed Government records on an individual which can be identified as applying to that individual and not the facts concerning the award of a pension or benefit or

the compilation of unidentified statistical information from personal records." Similarly, the Senate Report emphasized, S. Rep. No. 813, p. 9, "For example, health, welfare, and selective service records are highly personal to the person involved yet facts concerning the award of a pension or benefit should be disclosed to the public."

Moreover, even if we were to agree that "personnel files" are wholly exempt from any disclosure under Exemption 6, it is clear that the case summaries sought here lack the attributes of "personnel files" as commonly understood. Two attributes of the case summaries require that they be characterized as "similar files." First, they relate to the discipline of cadet personnel, and while even Air Force Regulations themselves show that this single factor is insufficient to characterize the summaries as "personnel files," it supports the conclusion that they are "similar." Second, and most significantly, the disclosure of these summaries implicates similar privacy values; for as said by the Court of Appeals, 495 F.2d, at 267, "identification of disciplined cadets--a possible consequence of even anonymous disclosure--could expose the formerly accused men to lifelong embarrassment, perhaps disgrace, as well as practical disabilities, such as loss of employment or friends." See generally, e.g., Wine Hobby USA, Inc. v. IRS, 502 F.2d 133, 135-137 (CA3 1974); Rural Housing Alliance v. Department of Agriculture, 162 U.S. App. D.C. 122, 125-126, 498 F.2d 73, 76-77 (1974); Robles v. EPA, 484 F.2d 843, 845-846 (CA4 1973). But these summaries, collected only in the Honor and Ethics Code Reading Files and the Academy's Honor Records, do not contain the "vast amounts of personal data," S. Rep. No. 813, p. 9, which constitute the kind of profile of an individual ordinarily to be found in his personnel file: showing, for example, where he was born, the names of his parents, where he has lived from time to time, his high school or other school records, results of examinations, evaluations of his work performance. Moreover, access to these files is not drastically limited, as is customarily true of personnel files, only to supervisory personnel directly involved with the individual (apart from the personnel department itself), frequently thus excluding even the individual himself. On the contrary, the case summaries name no names except in guilty cases, are widely disseminated for examination by fellow cadets, contain no facts except such as pertain to the alleged violation of the Honor of Ethics Codes, and are justified by the Academy solely for their value as an educational and instructional tool the better to train military officers for discharge of their important and exacting functions. Documents treated by the Agency in such a manner cannot reasonably be claimed to be within the common and congressional meaning of what constitutes a "personnel file" within Exemption 6.

The Agency argues secondly that, even taking the case summaries as files to which the "clearly unwarranted invasion of personal privacy"

qualification applies, the Court of Appeals nevertheless improperly ordered the Agency to produce the case summaries in the District Court for an in camera examination to eliminate information that could result in identifying cadets involved in Honor or Ethics Code violations. The argument is, in substance, that the recognition by the Court of Appeals of "the harm that might result to the cadets from disclosure" itself demonstrates "[t]he ineffectiveness of excision of names and other identifying facts as a means of maintaining the confidentiality of persons named in government reports . . . ." Brief for Petitioners 17-18.

This contention has no merit. First, the argument implies that Congress barred disclosure in any case in which the conclusion could not be guaranteed that disclosure would not trigger recollection of identity in any person whatever. But this ignores Congress' limitation of the exemption to cases of "clearly unwarranted" invasions of personal privacy. Second, Congress vested the courts with the responsibility ultimately to determine "de novo" any dispute as to whether the exemption was properly invoked in order to constrain agencies from withholding nonexempt matters. No court has yet seen the case histories, and the Court of Appeals was therefore correct in holding that the function of examination must be discharged in the first instance by the District Court. Ackerly v. Ley, [supra]; Rural Housing Alliance v. Department of Agriculture, supra.

In striking the balance whether to order disclosure of all or part of the case summaries, the District Court, in determining whether disclosure will entail a "clearly unwarranted" invasion of personal privacy, may properly discount its probability in light of Academy tradition to keep identities confidential within the Academy.[19] Respondents sought only such disclosure as was consistent with this tradition. Their request for access to summaries "with personal references or other identifying information deleted," respected the confidentiality interests embodied in Exemption 6. As the Court of Appeals recognized, however, what constitutes identifying information regarding a subject cadet must be weighed not only from the viewpoint of the public, but also from the vantage of those who would have been familiar, as fellow cadets

---

[19] The legislative history is clear that Exemption 6 was directed at threats to privacy interests more palpable than mere possibilities. The House Report explains that the exemption was intended to exclude files "the disclosure of which might harm the individual . . . [or] detailed Government records on an individual which can be identified as applying to that individual. . . ." H.R. Rep. No. 1497, p. 11 (emphasis supplied). And the Senate Report states that the balance to be drawn under Exemption 6's "clearly unwarranted invasion of personal privacy" clause is one between "the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." S. Rep. No. 813, p. 9 (emphasis supplied)

or Academy staff, with other aspects of his career at the Academy. Despite the summaries' distribution within the Academy, many of this group with earlier access to summaries may never have identified a particular cadet, or may have wholly forgotten his encounter with Academy discipline. And the risk to the privacy interests of a former cadet, particularly one who has remained in the military, posed by his identification by otherwise unknowing former colleagues or instructors cannot be rejected as trivial. We nevertheless conclude that consideration of the policies underlying the Freedom of Information Act, to open public business to public view when no "clearly unwarranted" invasion of privacy will result, requires affirmance of the holding of the Court of Appeals, 495 F.2d, at 267, that although ". . . no one can guarantee that all those who are 'in the know' will hold their tongues, particularly years later when time may have eroded the fabric of cadet loyalty," it sufficed to protect privacy at this stage in these proceedings by enjoining the District Court, id., at 268, that if in its opinion deletion of personal references and other identifying information "is not sufficient to safeguard privacy, then the summaries should not be disclosed to [respondents]." We hold, therefore, in agreement with the Court of Appeals, "that the in camera procedure [ordered] will further the statutory goal of Exemption Six: a workable compromise between individual rights 'and the preservation of public rights to Government information.'" Id., at 269.

To be sure, redaction cannot eliminate all risks of identifiability, as any human approximation risks some degree of imperfection, and the consequences of exposure of identity can admittedly be severe. But redaction is a familiar technique in other contexts and exemptions to disclosure under the Act were intended to be practical workable concepts, EPA v. Mink 410 U.S. at 79; S. Rep. No. 813, p. 5; H.R. Rep. No. 1497, p. 2. Moreover, we repeat, Exemption 6 does not protect against disclosure every incidental invasion of privacy--only such disclosures as constitute "clearly unwarranted" invasions of personal privacy.

Affirmed.

---

d. Courts that addressed issues under Exemption 6 and 7(C) have often had difficulty in balancing of the individuals privacy interest against the public interest in disclosure. In 1989, the Supreme Court extended FOIA privacy protection more broadly than any of the courts of appeals:

United States Department of Justice v.
Reporters Committee for Freedom of the Press
489 U.S. 749 (1989)
[footnotes omitted]

Justice STEVENS delivered the opinion of the Court.

The Federal Bureau of Investigation (FBI) has accumulated and maintains criminal identification records, sometimes referred to as "rap sheets," on over 24 million persons. The question presented by this case is whether the disclosure of the contents of the contents of such a file to a third party "could reasonably be expected to constitute an unwarranted invasion of personal privacy" within the meaning of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(C) (1982 ed., Supp. IV).

. . . .

Although much rap-sheet information is a matter of public record, the availability and dissemination of the actual rap sheet to the public is limited. Arrests, indictments, convictions, and sentences are public events that are usually documented in court records. In addition, if a person's entire criminal history transpired in a single jurisdiction, all of the contents of his or her rap sheet may be available upon request in that jurisdiction. That possibility, however, is present in only three States. All of the other 47 States place substantial restrictions on the availability of criminal-history summaries even though individual events in those summaries are matters of public record. Moreover, even in Florida, Wisconsin, and Oklahoma, the publicly available summaries may not include information about out-of-state arrests or convictions.

. . . .

III

This case arises out of requests made by a CBS news correspondent and the Reporters Committee for Freedom of the Press (respondents) for information covering the criminal records of four members of the Medico family. The Pennsylvania Crime Commission had identified the family's company, Medico Industries, as a legitimate business dominated by organized crime figures. Moreover, the company allegedly had obtained a number of defense contracts as a result of an improper arrangement with a corrupt Congressman.

The FOIA requests sought disclosure of any arrests, indictments, acquittals, convictions, and sentences of any of the four Medicos. Although the FBI originally denied the requests, it provided the requested data concerning three of the Medicos after their deaths. In their complaint in the

District Court, respondents sought the rap sheet for the fourth, Charles Medico (Medico), insofar as it contained "matters of public record." App. 33.

. . . .

IV

Exemption 7(C) requires us to balance the privacy interest in maintaining, as the Government puts it, the "practical obscurity" of the rap sheets, against the public interest in their release.

The preliminary question is whether Medico's interest in the nondisclosure of any rap sheet the FBI might have on him is the sort of "personal privacy" interest that Congress intended Exemption 7(C) to protect. As we have pointed out before, "[t]he cases sometimes characterized as protecting 'privacy' have in fact involved at least two different kinds of interest. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." Whalen v. Roe, 429 U.S. 589, 598-600, 97 S.Ct. 869, 875-877, 51 L.Ed.2d 64 (1977) (footnotes omitted). Here, the former interest, "avoiding disclosure of personal matters," is implicated. Because events summarized in a rap sheet have been previously disclosed to the public, respondents contend that Medico's privacy interest in avoiding disclosure of a federal compilation of these events approached zero. We reject respondents' cramped notion of personal privacy.

To begin with, both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person. In an organized society, there are few facts that are not at one time or another divulged to another. Thus the extent of the protection accorded a privacy right at common law rested in part on the degree of dissemination of the allegedly private fact and the extent to which the passage of time rendered it private. According to Webster's initial definition, information may be classified as "private" if it is "intended for or restricted to the use of a particular person or group or class of persons: not freely available to the public." Recognition of this attribute of a privacy interest supports the distinction, in terms of personal privacy, between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole. The very fact that federal funds have been spent to prepare, index, and maintain these criminal-history files demonstrates that the individual items of information in the summaries would not otherwise be "freely available" either to the officials who have access to the underlying files or to the general public. Indeed, if the summaries were "freely available", there would be no reason to invoke the FOIA to obtain access to the information they contain. Granted, in

many contexts the fact that information is not freely available is no reason to exempt that information from a statute generally requiring its dissemination. But the issue here is whether the compilation of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information. Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

. . . .

Also supporting our conclusion that a strong privacy interest inheres in the nondisclosure of compiled computerized information is the Privacy Act, codified at 5 U.S.C. § 552a (1982 ed. and Supp. IV). The Privacy Act was passed in 1974 largely out of concern over "the impact of computer data banks on individual privacy." H.R. Rep No. 93-1416, p.7 (1974). The Privacy Act provides generally that "[n]o agency shall disclose any record which is contained in a system of records . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b) (1982 ed., Supp. IV). Although the Privacy Act contains a variety of exceptions to this rule, including an Exemption for information required to be disclosed under the FOIA, see 5 U.S.C. § 552a(b)(2), Congress' basic policy concern regarding the implications of computerized data banks for personal privacy is certainly relevant in our consideration of the privacy interest affected by dissemination of rap sheets from the FBI computer.

. . . .

In addition to the common-law and dictionary understanding, the basic difference between scattered bits of criminal history and a federal compilation, federal statutory provisions, and state policies, our cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public. Most apposite for present purposes is our decision in Department of the Air Force v. Rose, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976). New York University law students sought Air Force Honor and Ethics Code case summaries for a Law Review project on military discipline. The Academy had already publicly posted these summaries on 40 squadron bulletin boards, usually with identifying names redacted (names were posted for cadets who were found guilty and who left the Academy), and with instructions that cadets should read the summaries only if necessary. Although the opinion dealt with Exemption 6's exception for "personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and our opinion today deals with Exemption 7(C), much of our discussion in

Rose is applicable here. We explained that the FOIA permits release of a segregable portion of a record with other portions deleted, and that in camera inspection was proper to determine whether parts of a record could be released while keeping other parts secret. See id., at 373-377, 96 S.Ct., at 1604-1607; 5 U.S.C. §§ 552(b) and (a)(4)(B) (1982 ed. and Supp. IV). We emphasized the FOIA's segregability and in camera provisions in order to explain that the case summaries, with identifying names redacted, were generally disclosable.

. . . .

[W]e doubly stressed the importance of the privacy interest implicated by disclosure of the case summaries. First: We praised the Academy's tradition of protecting personal privacy through redaction of names from the case summaries. But even with names redacted, subjects of such summaries can often be identified through other, disclosed information. So, second: Even though the summaries, with only names redacted, had once been public, we recognized the potential invasion of privacy through later recognition of identifying details, and approved the Court of Appeals' rule permitting the District Court to delete "other identifying information" in order to safeguard this privacy interest. If a cadet has a privacy interest in past discipline that was once public but may have been "wholly forgotten," the ordinary citizen surely has a similar interest in the aspects of his or her criminal history that may have been wholly forgotten.

. . . .

In sum, the fact that "an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information." Rehnquist, Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt. 1, p. 13 (Sept. 26-27, 1974). The privacy interest in a rap sheet is substantial. The substantial character of that interest is affected by the fact that in today's society the computer can accumulate and store information that would otherwise have surely been forgotten long before a person attains the age of 80, when the FBI's rap sheets are discarded.

. . . .

V

Exemption 7(C), by its terms, permits an agency to withhold a document only when revelation "could reasonably be expected to constitute an

unwarranted invasion of personal privacy." We must next address what factors might warrant an invasion of the interest described in Part IV, supra.

Our previous decisions establish that whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made. Except for cases in which the objection to disclosure is based on a claim of privilege and the person requesting disclosure is the party protected by the privilege, the identity of the requesting party has no bearing on the merits of his or her FOIA request. Thus, although the subject of a presentence report can waive a privilege that might defeat a third party's access to that report, United States Department of Justice v. Julian, 486 U.S. 1, 100 L.Ed.2d 1 (1988), and although the FBI's policy of granting the subject of a rap sheet access to his own criminal history is consistent with its policy of denying access to all other members of the general public, see supra, at 1471, the rights of the two press respondents in this case are no different from those that might be asserted by any other third party, such as a neighbor or prospective employer. As we have repeatedly stated, Congress "clearly intended" the FOIA "to give any member of the public as much right to disclosure as one with a special interest [in a particular document]." NLRB v. Sears Roebuck & Co., 421 U.S. 132, 149, 95 S.Ct. 1504, 1515, 44 L.Ed.2d 29 (1975); see NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 221, 98 S.Ct. 2311, 2317, 57 L.Ed.2d 159 (19780; FBI v. Abramson, 456 U.S. 615, 102 S.Ct. 2054, 72 L.Ed.2d 376 (1982). As Professor Davis explained: "The Act's sole concern is with what must be made public or not made public."

Thus whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to "the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny.'" Department of the Air Force v. Rose, 425 U.S., at 372, 96 S.Ct., at 1604, rather than on the particular purpose for which the document is being requested. In our leading case on the FOIA, we declared that the Act was designed to create a broad right of access to "official information." EPA v. Mink, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973). In his dissent in that case, Justice Douglas characterized the philosophy of the statute by quoting this comment by Henry Steele Commanger:

> "'The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to.'" Id. at 105, 93, S.Ct., at 845 (quoting from The New York Review of Books, Oct. 5, 1972, p. 7) (emphasis added).

This basic policy of "'full agency disclosure unless information is exempted under clearly delineated statutory language,'" Department of the Air Force v. Rose, 425 U.S., at 360-361, 96 S.Ct., at 1599 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965), indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case - and presumably in the typical case in which one private citizen is seeking information about another - the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.

The point is illustrated by our decision in Rose, supra. As discussed earlier, we held that the FOIA required the United States Air Force to honor a request for in camera submission of disciplinary-hearing summaries maintained in the Academy's Honors and Ethics Code reading files. The summaries obviously contained information that would explain how the disciplinary procedures actually functioned and therefore were an appropriate subject of a FOIA request. All parties, however, agreed that the files should be redacted by deleting information that would identify the particular cadets to whom the summaries related. The deletions were unquestionably appropriate because the names of the particular cadets were irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code; leaving the identifying material in the summaries would therefore have been a "clearly unwarranted" invasion of individual privacy. If, instead of seeking information about the Academy's own conduct, the requests had asked for specific files to obtain information about the persons to whom those files related, the public interest that supported the decision in Rose would have been inapplicable. In fact, we explicitly recognized that "the basic purpose of the [FOIA is] to open agency action to the light of public scrutiny." Id., at 372, 96 S.Ct. at 1604.

Respondents argue that there is a two-fold public interest in learning about Medico's past arrests or convictions: He allegedly had improper dealings with a corrupt Congressman and he is an officer of a corporation with defense contracts. But if Medico has, in fact, been arrested or convicted of certain crimes, that information would neither aggravate nor mitigate his allegedly improper relationship with the Congressman; more specifically, it would tell us nothing directly about the character of the Congressman's behavior. Nor would it tell us anything about the conduct of the Department of Defense (DOD) in awarding one or more contracts to the Medico Company. Arguably

a FOIA request to the DOD for records relating to those contracts, or for documents describing the agency's procedures, if any, for determining whether officers of a prospective contractor have criminal records, would constitute an appropriate request for "official information." Conceivably Medico's rap sheet would provide details to include in a news story, but, in itself, this is not the kind of public interest for which Congress enacted the FOIA. In other words, although there is undoubtedly some public interest in anyone's criminal history, especially if the history is in some way related to the subject's dealing with a public official or agency, the FOIA's central purpose is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed. Thus, it should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a Government agency to honor a FOIA request for information about a particular private citizen.

What we have said should make clear that the public interest in the release of any rap sheet on Medico that may exist is not the type of interest protected by the FOIA. Medico may or may not be one of the 24 million persons for whom the FBI has a rap sheet. If respondents are entitled to have the FBI tell them what it knows about Medico's criminal history, any other member of the public is entitled to the same disclosure - whether for writing a news story, for deciding whether or not to employ Medico, to rent a house to him, to extend credit to him, or simply to confirm or deny a suspicion. There is, unquestionably, some public interest in providing interested citizens with answers to their questions about Medico. But that interest falls outside the ambit of the public interest that the FOIA was enacted to serve.

. . . .

VI

Both the general requirement that a court "shall determine the matter de novo" and the specific reference to an "unwarranted" invasion of privacy in Exemption 7(C) indicate that a court must balance the public interest in disclosure against the interest Congress intended the Exemption to protect. Although both sides agree that such a balance must be undertaken, how such a balance should be done is in dispute. The Court of Appeals majority expressed concern about assigning federal judges the task of striking a proper case-by-case, or ad hoc, balance between individual privacy interest and the public interest in the disclosure of criminal-history information without providing those judges standards to assist in performing that task. Our cases provide support for the proposition that categorical decisions may be appropriate and individual circumstances disregarded when a case fits into a genus in which the balance characteristically tips in one direction. The point is well illustrated by

both the majority and dissenting opinions in NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978).

In Robbins, the majority held that Exemption 7(A), which protects from disclosure law-enforcement records or information that "could reasonably be expected to interfere with enforcement proceedings," applied to statements of witnesses whom the National Labor Relations Board (NLRB or Board) intended to call at an unfair-labor-practice hearing. Although we noted that the language of Exemptions 7(B), (C), and (D), seems to contemplate a case-by-case showing "that the factors made relevant by the statute are present in each distinct situation," id., at 223, 98 S.Ct., at 2318; see id., at 234, 98 S.Ct., at 2323, we concluded that Exemption 7(A) "appears to contemplate that certain generic determinations might be made." Id., at 224, 98 S.Ct. at 2318. Thus, our ruling encompassed the entire category of NLRB witness statements, and a concurring opinion pointed out that the category embraced enforcement proceedings by other agencies as well. See id., at 243, 98 S.Ct., at 2327 (STEVENS, J., concurring). In his partial dissent, Justice Powell endorsed the Court's "generic" approach to the issue, id., at 244, 98 S.Ct. at 2328; he agreed that "the congressional requirement of a specific showing of harm does not prevent determinations of likely harm with respect to prehearing release of particular categories of documents." Id., at 249, 98 S.Ct., at 2330. In his view, however, the exempt category should have been limited to statements of witnesses who were currently employed by the respondent. To be sure, the majority opinion in Robbins noted that the phrases "'a person,'" "'an unwarranted invasion,'" and "'a confidential source,'" in Exemptions 7(B), (C), and (D), respectively, seem to imply a need for an individualized showing in every case (whereas the plural "'enforcement proceedings'" in Exemption 7(A) implies a categorical determination). See id., at 223-224, 98 S.Ct. at 2318. But since only an Exemption 7(A) question was presented in Robbins, we conclude today, upon closer inspection of Exemption 7(C), that for an appropriate class of law-enforcement records or information a categorical balance may be undertaken there as well.

. . . .

In FTC v. Grolier Inc., 462 U.S. 19, 103 S.Ct. 2209, 76 L.Ed.2d 387 (1983), we also supported categorical balancing. Respondent sought FTC documents concerning an investigation of a subsidiary. At issue were seven documents that would normally be exempt from disclosure under Exemption 5, which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The Court of Appeals held that four of the documents "could not be withheld on the basis of the work-product rule unless the Commission could show that 'litigation related to the terminated action

exists or potentially exists.'" 462 U.S. at 22,103 S.Ct., at 2212. We reversed, concluding that even if in some instances civil-discovery rules would permit such disclosure, "[s]uch materials are not 'routinely' or 'normally' available to parties in litigation and hence are exempt under Exemption 5." Id., at 27, 103 S.Ct., at 2214. We added that "[t]his result, by establishing a discrete category of exempt information, implements the congressional intent to provide 'workable' rules. Only by construing the Exemption to provide a categorical rule can the Act's purpose of expediting disclosure by means of workable rules be furthered." Id., at 27-28, 103 S.Ct., at 2214-2215 (emphasis added).

Finally: The privacy interest in maintaining the practical obscurity of rap- sheet information will always be high. When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a compilation, rather than as a record of "what the Government is up to," the privacy interest protected by Exemption 7(C) is in fact at its apex while the FOIA-based public interest in disclosure is at its nadir. See Parts IV and V, supra. Such a disparity on the scales of justice holds for a class of cases without regard to individual circumstances; the standard virtues of bright-line rules are thus present, and the difficulties attendant to ad hoc adjudication may be avoided. Accordingly, we hold as a categorical matter that a third party's request for law-enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when the request seeks no "official information" about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is "unwarranted." The judgement of the Court of Appeals is reversed.

. . . .

---

e. Notes and Discussion.

Note 1. Remember that the first step in analyzing an Exemption 6 problem is to determine whether there is a cognizable privacy interest in the data at issue. See Hopkins v. Dep't of the Navy, Civil No 84-1868 (D.D.C. Feb 5, 1985) (disclosure ordered because court found no privacy interest in name, rank, and duty station of military personnel assigned to Quantico; fact that requester was a commercial life insurance salesman irrelevant); National W. Life Ins. Co. v. United States, 512 F. Supp. 454, 461 (N.D. Tex. 1980) (same for names and duty addresses of Postal Service employees).

Note 2. DoD Reg. 5400.7-R, para 3-200, has been revised to reflect the Supreme Court's holding that the requester's identity and purpose must be disregarded in making a FOIA disclosure determination. This aspect of Reporters Committee effectively overruled the line of cases which held that a requester's particular circumstances and intention to serve a public

interest through its use of the information was considered in the balancing process. See, e.g., Getman v. NLRB, 450 F.2d 670, 674-77 (D.C. Cir. 1971) (holding that labor law professor would serve public interest if given access to employee name-and-address list for empirical study of union election process); Disabled Officer's Ass'n v. Rumsfeld, 428 F. Supp. 454, 458 (D.D.C. 1977) (organization serving retired, disabled military officers held entitled to names and addresses of such personnel), aff'd, 574 F.2d 636 (D.C. Cir. 1979) (table cite). In National Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873 (D.C. Cir. 1989) (upholding nondisclosure of names and addresses of federal annuitants to organization that promotes their interests), the D.C. Circuit's first post-Reporters Committee Exemption 6 case, both Getman and Disabled Officer's Ass'n were expressly disapproved.

Note 3. The Supreme Court's narrowing of the relevant "public interest" in Reporters Committee to the FOIA's "core purpose" of "shed[ing] light on an agency's performance of its statutory duties" or informing its citizens about "what their government is up to" limits the amount of information about individuals that an agency is required to release under the FOIA. Can you think of any circumstance, in the military context, that a disclosure of personal information could serve a "socially useful purpose," but not satisfy the "core purpose" public interest?

Note 4. Recently the Supreme Court was asked to reconsider the "public interest" test it set down in Reporters Committee. In DOD v. FLRA, 510 U.S. 487 (1994), the FLRA sought disclosure of the names and home addresses of all employees within a bargaining unit so that the union could better communicate with the employees in aid of its collective-bargaining responsibilities. The Court recognized that the union was entitled to such information under 5 U.S.C. ∋ 7101(a), "unless otherwise prohibited by law," but noted that the Privacy Act, 5 U.S.C. § 552a(b)(2), prohibited such a disclosure unless required by the FOIA. It summarized this threshold determination by stating that "although this case requires us to follow a somewhat convoluted path of statutory cross-references, its proper resolution depends upon a discrete inquiry: whether disclosure of the home addresses 'would constitute a clearly unwarranted invasion of [the] personal privacy' of bargaining unit employees within the meaning of the FOIA." In holding that the names linked with their respective home addresses were protected under Exemption 6, the Supreme Court flatly rejected the FLRA's attempt to expand the Reporters Committee public interest test to effectuate the purpose of other statutes, in this case 5 U.S.C. ∋ 7101(a) (congressional finding that "labor organizations and collective bargaining in the civil service are in the public interest").

Note 5. In Department of State v. Washington Post Co., 456 U.S. 595 (1982) the Court reversed a series of cases from the D.C. Circuit by giving the phrase "similar files" a broad interpretation. Similar files are any files which contain information about particular individuals and are not limited to files containing intimate details or highly personal information. See also New York Times Co. v. NASA, 920 F.2d 1002 (D.C. Cir. 1990) (en banc) (voice recording of the Challenger shuttle crew constituted a "similar file" since the tape portrays the crew's individual voices).

Note 6. Recall that Exception 2 permits the release of information when "FOIA requires release." What if information would have to be disclosed if a FOIA request were received, but no FOIA request was in fact received? As an example, if you receive a telephonic request for a copy of an Article 15 just imposed on the deputy commanding general for misappropriation of government property, do you release it?. One court would label this a wrongful disclosure. Bartel v. FAA, 725 F.2d 1403 (D.C. Cir. 1984). The court pointed out that the statute allows release only when FOIA "requires" disclosure (i.e. - when you have received a proper FOIA request), not when FOIA would merely "permit" disclosure. Bartel leads to ridiculous results and is not in keeping with the spirit of voluntary disclosure envisioned by FOIA. Because of a bad set of facts, DOJ decided not to seek certiorari. Compare Bartel with Cochran v. United States, 770 F.2d 949 (11th Cir. 1985) (standing oral request from media is sufficient) and Jafari v. Dept. of the Navy, 728 F.2d 247, 249-50 (4th Cir. 1984) (oral request from civilian employer for dates reservist absent from drill is sufficient). Note that even under Bartel, it may be possible to disclose certain types of information "traditionally released by an agency to the public" in the absence of a FOIA request. See 725 F.2d at 1413 (dictum). Such information would include name, rank, date of rank, gross salary, duty assignments, office telephone number, source of commission, promotion sequence number, awards and decorations, educational level, and duty status in most circumstances. See para. 3-3a(1), AR 340-21 (5 July 1985).

4.4 Disclosure for a "Routine Use." 5 U.S.C. § 552a(b)(3).

a. Exception 3 to the disclosure prohibition permits disclosure of a record from a system of records for a routine use as described in the system notice. The Act defines routine use as: "with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected." All system notices contain a description of the routine use of the records.

b. Besides each individual system notice containing a routine use description, the Department of the Army has published blanket or general routine uses that apply to all systems of records. AR 340-21, para. 3-2.

c. Notes and discussion.

Note 1. Routine uses are construed narrowly by the courts. See Krohn v. DOJ, No. 78-1536 (D.D.C. Mar. 15, 1984) (routine use permitting disclosure during litigation held to be too broad and subject to abuse), modified, Nov. 29, 1984.

Note 2. Under the categorical exclusion found at paragraph 3-2d of AR 340-21 (5 July 1985), how do you process a congressional request for a record from a system of records?

The following guidance was given by the Office of Management and Budget for preparing the routine use for congressional inquiries:

Implementation of the Privacy Act of 1974,
Supplementary Guidance, Office of Management
and Budget, 40 Fed. Reg. 56741 (1975)

To assure that implementation of the Act does not have the unintended effect of denying individuals the benefit of congressional assistance which they request, it is recommended that each agency establish the following as a routine use for all of its systems, consistent with subsections (a)(7) and (e)(ll) of the Act:

> Disclosure may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

The operation of this routine use will obviate the need for the written consent of the individual in every case where an individual requests assistance of the Member which would entail a disclosure of information pertaining to the individual.

In those cases where the congressional inquiry indicates that the request is being made on behalf of a person other than the individual whose record is to be disclosed, the agency should advise the congressional office that the written consent of the subject of the record is required. The agency should not contact the subject unless the congressional office requests it to do so.

In addition to the routine use, agencies can, of course, respond to many congressional requests for assistance on behalf of individuals without disclosing personal information which would fall within the Privacy Act, e.g., a congressional inquiry concerning a missing Social Security check can be answered by the agency by stating the reason for the delay.

Personal information can be disclosed in response to a congressional inquiry without written consent or operation of a routine use--

If the information would be required to be disclosed under the Freedom of Information Act (Subsection (b)(2));

If the Member requests that the response go directly to the individual to whom the record pertains;

In "compelling circumstances affecting the health or safety of an individual * * *" (Subsection (b)(8)); or

To either House of Congress, or to the extent of matter within its jurisdiction, any committee or subcommittee * * *"(Subsection (b)(9)).

The routine use recommended above and disclosure thereunder are, of course, subject to the 30 day prior notice requirement of the Act (Subsection (e)(ll)). . . . Furthermore, when the congressional inquiry indicates that the request is being made on the basis of a written request from the individual to

whom the record pertains, consent can be inferred even if the constituent letter is not provided to the agency.

"This standard for implied consent does not apply to other than congressional inquiries."

Note 3. In Swenson v. Postal Service, 890 F.2d 1075 (9th Cir. 1989), the court ruled that the agency's congressional assistance routine use was not a valid basis for a disclosure of EEO information which was not at all responsive to the constituent's inquiry to her congressman.

4.5 Miscellaneous Authorized Disclosures.

a. Exception 4--disclosure to the Bureau of Census. 5 U.S.C. § 552a(b)(4).

b. Exception 5--disclosure for statistical research. 5 U.S.C. § 552a(b)(5).

c. Exception 6--disclosure to the National Archives. 5 U.S.C.§ 552a(b)(6).

d. Exception 7--disclosure for law enforcement purposes. 5 U.S.C. § 552a(b)(7).

Extract
Privacy Act Guidelines at 28955

. . . .

Disclosure for Law Enforcement Purposes. Subsection (b)(7) "To another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought:"

An agency may, upon receipt of a written request, disclose a record to another agency or unit of State or local government for a civil or criminal law enforcement for a civil or criminal law enforcement activity. The request must specify--

The law enforcement purpose for which the record is requested; and the particular record requested.

Blanket requests for all records pertaining to an individual are not permitted. Agencies or other entities seeking disclosure may, of course, seek a court order as a basis for disclosure. See subsection (b)(11).

A record may also be disclosed to a law enforcement agency at the initiative of the agency which maintains the record when a violation of law is

suspected; provided, that such disclosure has been established in advance as a "routine use" and that misconduct is related to the purposes for which the records are maintained. . . . This usage was explicitly addressed by Congressman Moorhead in explaining the House bill, on the floor of the House:

> It should be noted that the "routine use" exception is in addition to the exception provided for dissemination for law enforcement activity under subsection (b)(7) of the bill. Thus a requested record may be disseminated under either the "routine use" exception, the "law enforcement" exception, or both sections, depending on the circumstances of the case. (Congressional Record November 21, 1974, p. H10962.)

In that same discussion, additional guidance was provided on the term "head of the agency" as that term is used in this subsection ((b)):

> The words "head of the agency" deserve elaboration. The committee recognizes that the heads of Government departments cannot be expected to personally request each of the thousands of records which may properly be disseminated under this subsection. If that were required, such officials could not perform their other duties, and in many cases, they could not even perform record requesting duties alone. Such duties may be delegated, like other duties, to other officials, when absolutely necessary but never below a section chief, and this is what is contemplated by subsection (b)(7). The Attorney General, for example, will have the power to delegate the authority to request the thousands of records which may be required for the operation of the Justice Department under this section.

It should be noted that this usage is somewhat at variance with the use of the term "agency head" in subsections (j), and (k), rules and exemptions, where delegations to this extent are neither necessary nor appropriate.

This subsection permits disclosures for law enforcement purposes only to governmental agencies "within or under the control of the United States." Disclosures to foreign (as well as to State and local) law enforcement agencies may, when appropriate, be established as "routine uses."

Records in law enforcement systems may also be disclosed for law enforcement purposes when that disclosure has properly been established as a "routine use"; e.g., statutorily authorized responses to properly made queries to the National Driver Register; transfer by a law enforcement agency of protective intelligence information to the Secret Service.

Note: For release under exception 7, the request from the law enforcement agency must be in writing. Doe v. Naval Air Station, Pensacola, 768 F.2d 1229 (11th Cir. 1985) (telephonic request is not sufficient).

e. Exception 8--disclosure to a person under emergency circumstances. 5 U.S.C. § 552a(b)(8).

f. Exception 9--disclosure to Congress. 5 U.S.C. § 552a(b)(9). This contemplates disclosure only to either House of Congress as a body or to any committee, joint committee, or subcommittee thereof. This exception does not authorize release to individual Members of Congress. But see discussion at para. 4-4c, supra (disclosure for a "routine use").

g. Exception 10--disclosure to the Comptroller General. 5 U.S.C. § 552a(b)(10).

h. Exception 11--disclosure pursuant to the order of a court of competent jurisdiction. 5 U.S.C. § 552a(b)(ll). The Judge Advocate General has opined that the phrase "court of competent jurisdiction" refers to any state or federal court which has jurisdiction over the case or matter for which the records are requested, and not only to a court which has jurisdiction over the records custodian personally. A subpoena duces tecum issued by the clerk of court is not sufficient--the element of judicial review is missing. Bruce v. United States, 621 F.2d 914 (8th Cir. 1980); Stiles v. Atlanta Gas Light Co. 453 F. Supp. 798 (N.D. Ga. 1978). See Defense Privacy Board Opinion 34.

Note: A federal grand jury subpoena does not qualify as a court order either. Doe v. diGenova, 779 F.2d 74 (D.C. Cir. 1985) (excellent discussion of the difference between "court order" and "judicial process").

i. Exception 12 - disclosure to a consumer reporting agency of an individual's unsatisfied indebtedness to the United States. 5 U.S.C. § 552a(b)(12). This exception was added by the Debt Collection Act of 1982. Prior to disclosure, the government must afford the individual due process. See 31 U.S.C. § 3711(f).

4.6 Accounting for Disclosures.

a. The Privacy Act requires that when information is disclosed from a system of records that a record of the date, nature and purpose of each disclosure and the name and address of the person or agency to whom it was made must be kept for at least five years or the life of the record, whichever is longer. The accounting requirement does not apply, however, to disclosures within the agency and to disclosures required under the Freedom of Information Act. All other disclosures, even those made with the individual's written consent, must be accounted for. Except for disclosures made under the "law enforcement" provision discussed in para. 4-5d, above, the accounting must be made available to the individual named in the record at his request. If a record is corrected or is disputed by the individual to whom it

pertains, such correction or notation of dispute must be forwarded to any person or agency to which an accountable disclosure was made. 5 U.S.C. § 552a(c).

b. The Act also requires that agencies make reasonable efforts to assure that records are accurate, complete, timely, and relevant prior to disclosing them to any person other than a federal department or agency. This requirement does not apply to disclosure required by the Freedom of Information Act. 5 U.S.C. § 552a(e)(6).

c. Finally, the Privacy Act requires that efforts be made to notify an individual when a record pertaining to him is made available under compulsory legal process. 5 U.S.C. § 552a(e)(8).

APPENDIX A

April 8, 1992

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DIRECTOR, DEFENSE RESEARCH AND ENGINEERING
ASSISTANT SECRETARIES OF DEFENSE
COMPTROLLER
GENERAL COUNSEL
INSPECTOR GENERAL
DIRECTOR, OPERATIONAL TEST AND EVALUATION
ASSISTANTS TO THE SECRETARY OF DEFENSE
DIRECTOR, ADMINISTRATION AND MANAGEMENT
DIRECTORS OF THE DEFENSE AGENCIES

SUBJECT: Defense Privacy Board Advisory Opinions Transmittal Memorandum 92-1

This memorandum reissues the Defense Privacy Board Advisory Opinions. Former Opinions 14, 15, 28 and 40 have been withdrawn. Those opinions addressed Freedom of Information Act issues as opposed to Privacy Act matters. The enclosed opinions have been renumbered and should be substituted for those previously issued by the Defense Privacy Board.

[signed]

D.O. Cooke
Director

Enclosure

THIS PAGE LEFT BLANK INTENTIONALLY

DEFENSE PRIVACY BOARD

ADVISORY OPINIONS

DEFENSE PRIVACY OFFICE
1941 JEFFERSON DAVIS HIGHWAY
CRYSTAL MALL 4, ROOM 920
ARLINGTON, VA 22202-4502
(703) 607-2943
DSN 327-3943

THIS PAGE LEFT BLANK INTENTIONALLY

TABLE OF CONTENTS

1. PROVIDING WAGE AND EARNING STATEMENTS (W-2 FORMS) OF MILITARY PERSONNEL TO STATE AND LOCAL TAXING AUTHORITIES

A blanket routine use has been established for all Department of Defense (DoD) systems of records which permits disclosure of information contained in W-2 forms to state and local taxing authorities with which the Secretary of the Treasury has entered into agreements under 5 U.S.C. §§ 5516, 5517 and 5520. Accounting for disclosures made pursuant to this routine use is required by the Privacy Act. See 5 U.S.C. § 552a(c). Defense Privacy Board Advisory Opinion 12 contains guidance on accounting for mass disclosures.

2. PRIVACY RIGHTS AND DECEASED PERSONS

The Privacy Act and its legislative history are silent as to whether a decedent is an individual and whether anyone else may exercise the decedent's rights concerning records pertaining to him or her maintained by agencies. The Privacy Act's failure to provide specifically for the exercise of rights on behalf of decedents, coupled with the personal judgment implicitly necessary to exercise such rights, indicates that the Act did not contemplate permitting relatives and other interested parties to exercise Privacy Act rights after the death of the record subject. See Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28951 (July 9, 1975).

Whether access to records pertaining to a decedent should be permitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, depends on the circumstances in each particular case. The FOIA would permit an agency to withhold if:

a. In the case of "personnel and medical and similar files, the disclosure . . . would be a clearly unwarranted invasion of personal privacy" under 5 U.S.C. § 552(b)(6); or

b. In the case of law enforcement investigatory records, the disclosure would "constitute an unwarranted invasion of personal privacy" under 5 U.S.C. § 552(b)(7)(C).

Demise of a record subject (ending Privacy Act protection which permits disclosure only when required by the FOIA) does not mean the privacy-protective features of the FOIA no longer apply. Public interest in disclosure must be balanced against the degree of invasion of personal privacy. An agency need not automatically, in all cases, "disclose inherently private information as soon as the individual dies, especially when the public's interest in the information is minimal." Kiraly v. Federal Bureau of Investigation, 728 F.2d 273, 277 (6th Cir. 1984).

As a final point, a decedent's records may pertain as well to other living individuals, and to the extent that the records are retrieved by their personal identifiers, their Privacy Act rights remain in effect. As to any records of a decedent requested under the FOIA, the degree to which the personal privacy of the decedent's relatives, or anyone else to whom the records pertain would be invaded must be considered in the FOIA balancing test mentioned above. See DoD 5400.7-R, paragraph 3-200, no. 6.

In applying the FOIA balancing test to the records of those individuals who remain missing or unaccounted for as a result of the Vietnam conflict, the privacy sensibilities of their family

members should be considered as a clear and present factor that weighs against the public release of information. The release of information regarding these records should be limited to basic information such as name, rank, date of loss, country of loss, current status, home of record (city and state), and any other privacy information that the primary next of kin has consented to releasing.

3. DISCLOSURE OF RECORDS FROM A SYSTEM OF RECORDS TO THE NEXT OF KIN OF PERSONS MISSING IN ACTION OR OTHERWISE UNACCOUNTED FOR

A legal guardian appointed by a court of competent jurisdiction for a member missing in action or otherwise unaccounted for would be in the position of the member and have the same rights as the member. 5 U.S.C.§ 552a(h). In such a case, records contained in a system of records and relating to the missing member may be disclosed to third persons upon the written consent of the guardian. If no guardian has been appointed or an appointed guardian does not give written consent, such records may be disclosed only if authorized by 5 U.S.C. § 552a(b).

For example, information relating to persons missing in action or otherwise unaccounted for may be disclosed "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11). [For a discussion of "order of a court of competent jurisdiction," see Defense Privacy Board Advisory Opinion 37.] In a case involving the families of military personnel missing in action, one court ordered, in part, that next of kin receiving governmental financial benefits which could be terminated by a status review be afforded "reasonable access to the information upon which the status review will be based." McDonald v. McLucas, 371 F. Supp. 831, 836 (S.D.N.Y. 1974). Since a status review is likely to require access to almost all significant information in a system of records pertaining to a member missing in action, this order constitutes sufficient authority under the Privacy Act for disclosure of almost any personal records of interest.

Information in a system of records also may be available to any person under the Freedom of Information Act (FOIA) if disclosure of the records concerned does not constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6); 5 U.S.C. § 552a(b)(2). In determining what information must be disclosed under this standard, a balancing test weighing the public interest in disclosure against the potential invasion of personal privacy should be conducted. See DoD 5400.7-R, paragraph 3-200, No. 6. See, e.g., Department of the Air Force v. Rose, 425 U.S. 352, 96 S. Ct. 1592, 48 L. Ed.2d 11 (1976); Church of Scientology v. Department of Defense, 611 F.2d 738 (9th Cir. 1979). Because facts and needs will differ in each case, the balancing test may require disclosure of information in one circumstance but not in another. See Getman v. National Labor Relations Board, 450 F.2d 670 (D.C. Cir. 1971); Robles v. Environmental Protection Agency, 484 F.2d 843 (4th Cir. 1973); Wine Hobby, USA, Inc. v. Bureau of Alcohol, Tobacco and Firearms, 502 F.2d 133 (3rd Cir. 1974).

Due to the unusual circumstances involved when a service member is missing in action or otherwise unaccounted for, next of kin may have a more compelling case for disclosure of a requested record than would other third parties. However, each request must be evaluated on its own merits.

Should the record subject's status be changed to "deceased," see Defense Privacy Board Advisory Opinion 2 concerning application of the Privacy Act and FOIA to decedents' records.

4. CORRECTIONS OF MILITARY RECORDS UNDER THE PRIVACY ACT

One main purpose of the Privacy Act is to ensure records pertaining to individuals are maintained accurately so informed decisions based on those records can be made. The Privacy Act amendment provision, 5 U.S.C.§ 552a(d)(2), permits individuals to request factual amendments to records pertaining to them. It does not permit correction of judgmental decisions such as efficiency reports or selection and promotion board reports. These judgmental decisions may be challenged before the Boards for Correction of Military and Naval Records which by statute are authorized to make these determinations. 10 U.S.C. § 1552. If factual matter is corrected under Privacy Act procedures, subsequent judgmental decisions that may have been affected by the factual correction, if contested, should be considered by the Boards for Correction of Military and Naval Records.

5. APPLICABILITY OF THE PRIVACY ACT TO NATIONAL GUARD RECORDS

As defined in the Privacy Act, "maintain" includes various record-keeping functions to which the Act applies; i.e., maintaining, collecting, using, and disseminating. In turn, this connotes control over and responsibility and accountability for systems of records. 5 U.S.C. § 552a(a)(3); Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28954 (July 9, 1975) (OMB Guidelines).

Reserve components of the Army and the Air Force include the Army and Air National Guards of the United States respectively, which are composed of federally recognized units and organizations of the Army or Air National Guard and members of the Army or Air National Guard who are also Reserves of the Army or Air Force. 10 U.S.C. §§ 3077 and 8077. 10 U.S.C. § 275 requires the Departments of the Army and the Air Force to maintain personnel records on all members of the federally recognized units and organizations of the Army and Air National Guards and on all members of the Army or Air National Guards who are also reserves of the Army and Air Force. Such records are "maintained" by the Army or Air Force for the purposes of the Privacy Act. These records are not all located at the National Guard Bureau. Some are in the physical possession of the state adjutant general. However, records need not be physically located in the agency for them to be maintained by the agency. See OMB Guidelines. Records located at the state level are under the direct control of the Army and Air Force in that they are maintained by the state under regulations (NGR 600-200 and AFR 35-44) implementing 10 U.S.C. § 275, and promulgated by authority of the Secretaries of the Army and the Air Force under 10 U.S.C. § 280. Therefore, the records are Army or Air Force records and subject to the provisions of the Privacy Act.

That the records are subject to the Privacy Act does not mean they cannot be used by the members of the state national guards. The state officials using and maintaining the records are members of the reserves (members of the Army or Air Force National Guard of the United

States). Disclosure to them in performance of their duties is disclosure within the Department of Defense not requiring a published routine use or an accounting.

6. ASSESSING FEES TO MEMBERS OF CONGRESS FOR FURNISHING RECORDS WHICH ARE SUBJECT TO THE PRIVACY ACT

The Privacy Act authorizes an agency to "establish fees to be charged, if any, to any individual for making copies of his record . . . ." 5 U.S.C.§ 552a(f)(5). Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28968 (July 9, 1975) and DoD 5400.11-R each point out that a fee may be charged for only the direct cost of making the copy. This guidance also states that if copying is the only means whereby the record can be made available to the individual, reproduction fees will not be assessed.

Therefore, charging fees is discretionary. However, as a general policy, the Department of Defense should not charge Members of Congress for records furnished when requested under the Privacy Act, unless the charge would be substantial. In no event should a fee less than $30.00 be determined substantial. In the case of constituent inquiries involving a substantial fee, a suggestion may be made that the Member of Congress advise the constituent that the information may be obtained by writing the appropriate office and paying reproduction costs. Additionally, the record may be examined at no cost if the constituent wishes to visit the record custodian.

7. DISCLOSURE OF HOME OF RECORD TO MEMBERS OF CONGRESS

The blanket routine use provisions for Department of Defense (DoD) systems of records, first published on October 9, 1975, at 40 Fed. Reg. 47748, are sufficiently broad to permit the disclosure of home of record information to a Member of Congress or Congressional staff member who is making an inquiry of a DoD component at the request of the subject service member, even if the subject member's request did not concern that particular portion of the service record.

However, the service record entry for home of record is intended to reflect the member's home at the time of entry into service or order to active duty. The Member of Congress or Congressional staff member may be more interested in the service member's legal residence for voting purposes or as entered on a W-4 form and as reflected by the member's pay record. Disclosure of home of record information to a Member of Congress or a Congressional staff member should include a caveat that it reflects only the home address at the time of entry into service or order to active duty.

8. ACCOUNTING FOR DISCLOSURES OF RECORDS THROUGH MILITARY LEGISLATIVE LIAISON CHANNELS

Procedures and divisions of responsibility should be established by military departments to ensure preparation of required accountings when information concerning individuals is disclosed to Members of Congress. Whether disclosure is made pursuant to an established routine use or prior

written consent of the record subject, an accounting must be kept. See 5 U.S.C.§ 552a(c). When a disclosure is made directly to a Member of Congress by the custodian of the record, that activity is responsible for keeping an appropriate accounting. However, a more difficult administrative problem arises when requested information is transmitted by the custodian to the legislative liaison activity for re-transmittal and the latter either deletes from or adds to information originally provided. In such cases it might be impossible for the custodian to keep an accurate accounting of what actually was disclosed to the Congressional office unless the legislative liaison office provides feedback.

The problem should not be resolved on a DoD-wide scale because the formulation of specific procedures for disclosure accounting will involve consideration of a number of factors which will vary among the military departments and other DoD components. The factors include internal organizational relationships, the components' prescribed methods and responsibilities for responding to Congressional inquiries, and possibly the characteristics of the particular records and record systems involved.

The liaison activity should prepare a disclosure accounting and forward it to the custodian. The accounting should contain the name and address of the person to whom the disclosure was made and the Member of Congress for whom he or she works, as well as the date, nature and purpose of the disclosure. The name, rank, title and duty address of the person making the disclosure also should be included. The accounting must be kept for five years or the life of the record, whichever is longer.

9. THE PRIVACY ACT AND MINORS

The Privacy Act applies to any "individual" which is defined as "a citizen of the United States or an alien lawfully admitted for permanent residence." 5 U.S.C. § 552a(a)(2). With respect to any rights granted the individual, no restriction is imposed on the basis of age; therefore, minors have the same rights and protections under the Privacy Act as do adults.

The Privacy Act provides that "the parent of any minor . . . may act on behalf of the individual." 5 U.S.C. § 552a(h). This subsection ensures that minors have a means of exercising their rights under the Privacy Act. Office of Management and Budget Privacy Act Guidelines (OMB Guidelines), 40 Fed. Reg. 28949, 28970 (July 9, 1975). It does not preclude minors from exercising rights on their own behalf, independent of any parental exercise. Parental exercise of the minor's Privacy Act rights is discretionary. A Department of Defense (DoD) component may permit parental exercise of a minor's Privacy Act rights at its discretion, but the parent has no absolute right to exercise the minor's rights absent a court order or the minor's consent. See OMB Guidelines, 40 Fed. Reg. 56741, 56742 (December 4,1975). Further, the parent exercising a minor's rights under the Privacy Act must be doing so on behalf of the minor and not merely for the parent's benefit. DePlanche v. Califano, 549 F. Supp. 685 (W.D. Mich. 1982).

The age at which an individual is no longer a minor becomes crucial when an agency must determine whether a parent may exercise the individual's Privacy Act rights. With respect to records maintained by DoD components, the age of majority is 18 years unless a court order states otherwise or the individual, at an earlier age, marries, enlists in the military, or takes some

other action that legally signifies attainment of majority status. Once an individual attains the age of majority, Privacy Act rights based solely on parenthood cease.

10. DISCLOSURE OF IDENTITIES OF CONFIDENTIAL SOURCES FROM INVESTIGATIVE RECORDS EXEMPTED UNDER SUBSECTION (k)(2)

If a system of records has been exempted under subsection (k)(2) of the Privacy Act, information that would identify a confidential source may be withheld from an individual requesting access to the record under the Privacy Act. 5 U.S.C. § 552a(k)(2). Only information that would not reveal the identity of a confidential source automatically becomes accessible under the Privacy Act when the record subject is denied a right, benefit or privilege.

The Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28973 (July 9, 1975), contain language from the Congressional Record suggesting that the record subject can learn the "substance and source of confidential information" if that information is used to deny him some right, benefit or privilege. However, such language does not refer to Privacy Act compliance. It refers to the possibility that revealing the identity of the confidential source might be required by due process or discovery rules in the course of an administrative or judicial challenge to an adverse action based on information supplied by the source.

11. APPLICATION OF THE PRIVACY ACT TO INFORMATION IN HOSPITAL COMMITTEE MINUTES

The Privacy Act grants access to records contained in systems of records. 5 U.S.C. § 552a(d)(1). To qualify as a "system of records," the information must be retrieved by an individual's name or other identifying particular. 5 U.S.C. § 552a(a)(5). Hospital committee minutes not filed or indexed under an individual's name or other identifying particular are not within a system of records subject to the Privacy Act. Hence, access to those minutes may be denied the individual requesting them under that statute.

12. ACCOUNTING FOR MASS DISCLOSURES OF RECORDS TO OTHER AGENCIES

It is inappropriate to enter into inter-agency support agreements negating the requirement to keep an accounting of disclosures made from systems of records. Except for disclosures made within the agency or pursuant to the Freedom of Information Act, each agency must keep an accurate accounting of all disclosures made from systems of records under its control. 5 U.S.C.§ 552a(c).

Neither the Privacy Act nor the Office of Management and Budget Privacy Act Guidelines, however, specify a form for maintaining the accounting. See 40 Fed. Reg. 28949, 28956 (July 9, 1975). They require only that an accounting be maintained, that it be available to the individual to whom the record pertains, that it be used to advise previous recipients of corrections to records, and that it be maintained so a disclosure of records may be traced to the records disclosed.

Individual records need not be marked to reflect disclosure unless necessary to satisfy this tracing requirement.

With respect to mass disclosures, if disclosures are of all records or all of a category of records, it is sufficient simply to identify the category of records disclosed, including the other information required under 5 U.S.C. § 552a(c), in a comprehensible form and make it available as required. Similarly, if disclosures occur at fixed intervals, a statement to that effect, as opposed to a statement at each occasion of disclosure, will satisfy the accounting requirement. If a mass disclosure is not of a complete category of records but, for example, of a random selection within a category, then the above information with a list of individuals whose records were disclosed could be maintained. Appropriate officials then could review this list to provide information to satisfy accounting provisions of the Act.

13. DISCLOSURE OF RECORDS TO STATE AGENCIES TO VALIDATE UNEMPLOYMENT COMPENSATION CLAIMS OF FORMER FEDERAL EMPLOYEES AND MILITARY MEMBERS

Federal agencies, under specific circumstances, are required to disclose records to state agencies administering unemployment compensation claims for former federal civilian employees and military members. Such information includes period of military service, pay grade or amount of federal wages and allowances, reasons for termination of federal service or discharge from military service, and conditions under which a military discharge or resignation occurred. 5 U.S.C. § 8506 and § 8523; 20 C.F.R. § 614.

14. DISCLOSURE OF RECORDS TO FINANCIAL INSTITUTIONS

Information concerning a military member's rank, date of rank, salary, present and past duty assignments, future assignments which have been finalized, office telephone number, office address, length of military service, and duty status may be disclosed to any person requesting such information under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and subsection (b)(2) of the Privacy Act, 5 U.S.C. § 552a, if the information is not classified and disclosure is in conformity with Defense Privacy Board Advisory Opinions 14 and 15.

The Federal Personnel Manual (FPM) authorizes disclosure of information concerning a federal civilian employee's present and past position descriptions, grades, salaries, and duty stations (including office address) to any person under the FOIA if the information is not classified. The FPM further provides that credit firms may be provided more detailed information concerning tenure of employment, Civil Service status, length of service in the agency and the federal government, and certain information concerning separation of an employee.

When disclosure of particular information requested by a credit bureau would not be authorized under provisions described above, information about individuals may be disclosed from military or civilian personnel records by Department of Defense components with written consent of the subject employee or military member specifically authorizing the disclosure of the requested information. 5 U.S.C. § 552a(b).

15. DISCLOSURE OF PHOTOGRAPHS IN THE CUSTODY OF THE DEPARTMENT OF DEFENSE

Photographs of members of the armed forces and Department of Defense employees taken for official purposes usually may be disclosed when requested under the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a(b)(2), unless the photograph depicts matters that, if disclosed to public view, would constitute a clearly unwarranted invasion of personal privacy. 5 U.S.C. § 552(b)(6). Generally, award ceremony photographs, selection file photographs, chain of command photographs and similar photographs may be disclosed. Taking such photographs is not collection of information under 5 U.S.C. § 552a(e)(3), so a Privacy Act advisory statement is not required.

16. DISCLOSURE OF RECORDS FROM SYSTEMS OF RECORDS TO A CONTRACTOR PURSUANT TO A CONTRACT

When an agency contracts for operation of a system of records to accomplish an agency function, the contract must cause the Privacy Act to apply to the system of records. Thus, the contractor and the contractor's employees will be considered to be employees of the agency and subject to the provisions of the Privacy Act. 5 U.S.C. § 552a(m).

The Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28976 (July 9, 1975), state that the sole purpose of the contract might not be to operate a system of records, but the contract normally would provide that the contractor operate such a system as a specific requirement of the contract. If the contract can be performed only by operating a system of records, subsection (m) applies even though the contract does not provide expressly for operation of a system of records.

If the contract meets the requirements of subsection (m), the system of records operated by the contractor is deemed to be operated by the agency. Hence, disclosure of records to the contractor is authorized under 5 U.S.C.§ 552a(b)(1) when the contract requires the contractor, explicitly or implicitly, to maintain a system of records to perform an agency function.

17. DEFINITION OF AN "AGENCY OR INSTRUMENTALITY OF ANY JURISDICTION WITHIN OR UNDER THE CONTROL OF THE UNITED STATES"

For purposes of nonconsensual disclosures of records from systems of records under 5 U.S.C. § 552a(b)(7), "agency or instrumentality of any jurisdiction within or under the control of the United States" includes any federal agency or unit wherever located and any state or local government agency or unit within the United States legally authorized to enforce civil or criminal laws. The types of agencies or units that may receive records under subsection (b)(7) are as numerous as the entities legally authorized to enforce civil or criminal laws. Such agencies or units may include a city dogcatcher charged with enforcing animal control laws, a county tax

collector charged with enforcing county tax laws, a state governor charged with enforcing all state laws, and the Director of the Federal Bureau of Investigation charged with enforcing federal laws.

18. LOCATION OF PRIVACY ACT ADVISORY STATEMENTS

Placement of the Privacy Act advisory statement in a form should be in the following order of preference:

a. Below the title of the form and positioned so the individual will be advised of the requested information,

b. Within the body of the form with a notation of its location below the title of the form,

c. On the reverse of the form with a notation of its location below the title of the form,

d. Attached to the form as a tear-off sheet, or

e. Issued as a separate supplement to the form.

19. PRIVACY ACT ADVISORY STATEMENTS FOR INSPECTOR GENERAL COMPLAINT FORMS

Under 5 U.S.C. § 552a(e)(3), a Privacy Act advisory statement is required for Inspector General complaint forms. The agency does not initiate a request for information from an individual, but asks for certain information in order only to respond to a complaint which was initiated voluntarily by an individual. Taking action based on information volunteered by an individual does not eliminate the need for a Privacy Act advisory statement.

Implicit in providing a Privacy Act advisory statement is the notion of informed consent. An individual should be provided sufficient advice about a request for information to make an informed decision about whether or not to respond. See Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28961 (July 9, 1975). The intent of the Privacy Act is to advise individuals requested to provide information about themselves for a system of records about the authority for collecting the information, the uses to be made of it, whether it is voluntary or mandatory to provide it, and the consequences of not providing it. Whenever an agency asks individuals for information about themselves for a system of records, a Privacy Act advisory statement must be provided. There is no difference between an Inspector General complaint which triggers a request for information and a medical form completed only after an individual voluntarily initiates a request for treatment. All agencies have determined that all medical forms require Privacy Act advisory statements.

20. RECRUITMENT ADVERTISEMENTS IN THE PUBLIC MEDIA

Published coupons and business return postcards are used as a means for an individual to request from the military service information concerning a particular recruiting program, and they usually contain blanks for the individual's name, address, telephone number, date and place of birth, level of education, degrees received, and the most recent previous educational agency or institution attended. If the coupon or postcard is used solely to fulfill the individual's request for information and then promptly is destroyed, the information is not entered into a system of records and a Privacy Act advisory statement is not required under 5 U.S.C. § 552a(e)(3)and DoD 5400.11-R.

If any information about an individual is maintained in a system of records; i.e., kept and retrieved by an individual's personal identifier, then a Privacy Act advisory statement is required. The individual must be told the authority that permits the agency to collect the information, whether it is mandatory to provide the information, the purposes and routine uses of the information, and the effects, if any, on the individual for not providing the information. Also, if the Social Security number (SSN) is requested, the individual must be told the federal statute or executive order of the President that allows solicitation of the SSN, whether it is mandatory to provide it, and the uses to be made of it.

For both the SSN and the other information about the individual, it will be voluntary for the individual to provide them, and the effects of not providing either may result in a delay or inability in providing information to the individual. The SSN will be used to retrieve information about the individual and to verify the individual's identity. The remaining items of the Privacy Act advisory statement (authority, purposes, and routine uses) must be derived from the component's recruiting system of records notice as published in the Federal Register.

21. INFORMATION REQUESTED IN THE PUBLIC DOMAIN

DoD 5400.11-R requires giving a Privacy Act advisory statement whenever individuals are requested to supply information about themselves for a system of records; hence, the requirement is not avoided merely because the information is in the public domain or required to be disclosed under the Freedom of Information Act (FOIA). If information solicited from an individual is to be placed in a system of records, an advisory statement is necessary, regardless of whether the same information is in the public domain or would be disclosed under the FOIA.

22. IMPLICATIONS ON VARIOUS METHODS OF DISTRIBUTING LEAVE AND EARNING STATEMENTS

Three basic methods of distributing leave and earning statements (LES) in the Department of Defense are:

a. The LES is mailed to the individual's home address;

b. The LES is handed out by office clerical personnel, either with or without the pay check; or

c. The LES is handed out in an envelope by office clerical personnel either with or without the pay check.

The LES contains information about individuals that is protected by the Privacy Act. Distribution may be made in any manner so long as the information is not disclosed to persons other than those that have a requirement to process the statements in the course of their official duties. Hence, any of the methods indicated would be acceptable if the procedures preclude unauthorized disclosure to individuals outside the leave and earnings system.

23. THE APPEARANCE OF THE SOCIAL SECURITY NUMBER IN THE WINDOW OF AN ENVELOPE CONTAINING RECORD INFORMATION DOES NOT CONSTITUTE A DISCLOSURE

The appearance of the Social Security number (SSN) in a window envelope does not constitute a disclosure as contemplated by the Privacy Act. Prior to delivery to the recipient, the only likely disclosure is to personnel of the postal service who handle the letter in the performance of their official duties under agreement with the Department of Defense. However, when revising formats of the document or envelope, consideration should be given to preventing the appearance of the SSN through the window of the envelope.

24. WHAT CONSTITUTES A PRIVACY ACT REQUEST FOR ACCESS OR AMENDMENT FOR PURPOSES OF COMPLIANCE WITH PROCESSING AND REPORTING REQUIREMENTS

There is no requirement in the Privacy Act that a request specify or cite that law before it is to be processed or accounted for as a Privacy Act request. As a matter of policy, only requests which specify or clearly imply that they are being made under the Privacy Act receive the formal processing required by the law and implementing regulations and are reported as "Privacy Act requests." This avoids including routine record checks and requests to modify or update data elements in the annual Privacy Act report. This policy agrees with guidance issued by the Office of Management and Budget in Circular No. A-130, 50 Fed. Reg. 52730, 52739 (December 24,1985). However, this does not mean that requests not citing the Privacy Act should not be honored.

25. INFORMATION PERTAINING TO THIRD PARTIES MAY NOT BE PROTECTED BY THE PRIVACY ACT

An individual's record is defined as "information about an individual that is maintained by an agency," and a system of records is "a group of any records from which information is retrieved by the name . . . or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(4) and (5), respectively. Since 5 U.S.C. § 552a(e)(1) requires that agencies maintain "only such information about an individual as is relevant and necessary," all information in an individual's record must pertain to him or her. Therefore, when an individual seeks access to or a copy of records under 5 U.S.C. § 552a(d)(1), all records pertaining to him or her in systems of records must be disclosed, with certain exceptions not here germane.

A reference to subject A in a file retrieved only by subject B's identifier would not be available to subject A under the Privacy Act. However, if an indexing capability exists so that the same file also is retrieved by subject A's identifier, then subject A and B, both, would have access to the entire record. See Voelker v. Internal Revenue Service, 646 F.2d 332 (8th Cir. 1981); Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28957 (July 9, 1975).

26. DISCLOSURE OF SECURITY CLEARANCE LEVEL

If the information concerning an individual's security clearance is classified, it is protected from disclosure under the Privacy Act if the system of records has been exempted from access pursuant to 5 U.S.C. § 552a(k)(1) and it may be protected from disclosure under the Freedom of Information Act (FOIA) exemption for classified information, 5 U.S.C. §552(b)(1). If the information is unclassified, the individual concerned will have access under the Privacy Act, but the determination as to disclosure to a third party who has submitted a FOIA request must be made under the FOIA, 5 U.S.C. § 552(b)(6). The determination would have to be made using the balancing test, balancing the public's right to know against the individual's right of privacy. See Department of the Air Force v. Rose, 425 U.S. 352, 96 S. Ct. 1592, 48 L. Ed. 2d 11 (1976).

27. PRIVACY ACT APPLICABILITY TO LEGAL MEMORANDA MAINTAINED IN A SYSTEM OF RECORDS

The Privacy Act specifically denies authority for individual access to any information compiled in reasonable anticipation of a civil action or proceeding. 5 U.S.C. § 552a(d)(5). Not only is an attorney's "work product" protected from access under the Act, but any information compiled in reasonable anticipation of a civil action or proceeding is protected. The term "civil proceeding" covers quasi-judicial and preliminary judicial steps which are the civil counterparts to criminal proceedings occurring before actual criminal litigation. Office of Management and Budget Privacy Act Guidelines, 40 Fed. Reg. 28949, 28960 (July 9, 1975). Once information is prepared in reasonable anticipation of a civil action or proceeding, subsection (d)(5) continues to protect the material regardless of whether litigation is initiated, dropped or completed.

A determination as to whether material is prepared in anticipation of a civil action or proceeding must be made on an ad hoc basis for each document in question. In making this determination, all circumstances must be considered, including intent of the author at the time a document was prepared and the presence or imminence of a civil action or proceeding. Note: This provision applies to access under the Privacy Act only and has no effect on access, if any, available under the Freedom of Information Act, 5 U.S.C. § 552, or rules of civil procedure. Further, this determination does not apply to work product not maintained in a system of records retrieved by a personal identifier.

28. THE PRIVACY ACT DOES NOT APPLY TO FILES INDEXED BY NON-PERSONAL IDENTIFIERS AND RETRIEVED BY MEMORY

Labeling of files by non-personal identifiers makes access requirements of the Privacy Act inapplicable unless such files actually are retrieved on the basis of an individual identifier through a cross-reference system or some other method. The human memory alone does not constitute across-reference system.

29. DEPERSONALIZING COMPUTER CARDS AND PRINTOUTS BEFORE DISPOSAL

A massive release of computer cards and printouts for disposal is not a disclosure of personal information precluded by the Privacy Act if volume of the records, coding of information in them, or some other factor renders it impossible to pinpoint any comprehensible information about a specific individual. Such computer products may be turned over to a Defense Reutilization and Marketing Office for authorized disposal by sale or recycling, without deleting names or other identifying data.

30. NO SUPPLEMENTAL CHARGES MAY BE ASSESSED FOR UNLISTED TELEPHONE NUMBER SERVICE ON INSTALLATIONS WHERE NO COMMERCIAL SERVICE IS AVAILABLE

An individual should have the opportunity to elect not to have his or her home address and telephone number listed in a base telephone directory of class B subscribers if no commercial telephone service is available. Individuals should be excused from paying an additional cost involved in maintaining an unlisted number if they comply with regulations providing for unlisted numbers.

31. THE PRIVACY ACT GENERAL EXEMPTION DOES NOT FOLLOW THE RECORD

A record created and maintained in a criminal law enforcement system of records and properly exempted under the general exemption of the Privacy Act, 5 U.S.C. § 552a(j)(2), may not retain that exemption when a copy of the record is permanently filed in a system of records maintained

by a non-criminal law enforcement activity. Specifically, copies of records otherwise afforded a general exemption will lose their exempt character when permanently filed in nonexempt systems.

Invoking the general exemption should be limited to certain systems of records maintained by only Department of Defense (DoD) criminal law enforcement activities. Such activities include police efforts to prevent, control and reduce crime or to apprehend criminals and the activities of prosecutors, courts, correctional, probation, pardon or parole authorities. The general exemption is not for systems of records maintained by any other DoD activity that may have copies of reports of criminal investigations. Congress intended that only activities which perform criminal law enforcement functions are entitled to this general exemption for a record system. Merely filing a few criminal law enforcement records in one of its records systems will not entitle an activity not involved in criminal law enforcement to invoke a general exemption for the entire system.

Individuals seeking access under the Privacy Act to criminal law enforcement records in the temporary custody of a command or activity should be directed to the organization that created the records. However, any activity's files concerning adjudication or other personnel actions based on criminal law enforcement records are the records, without the general exemption, of the using activity which shall respond to all Privacy Act requests other than those seeking access to or amendment of the criminal law enforcement record.

32. THE PRIVACY ACT SYSTEM NOTICE REQUIREMENT APPLIES TO COURT-MARTIAL FILES

Procedures and policies regarding courts-martial are governed by the Uniform Code of Military Justice and the Manual for Courts-Martial. Congress recognized the unique nature of court-martial proceedings and exempted them from requirements of the Privacy Act by specifically excluding them from the definition of "agency." See 5 U.S.C. § 551(1)(F). Although courts-martial, themselves, are not "agencies" for purposes of the Privacy Act, records of trials by courts-martial are maintained by agencies long after the courts-martial involved have been dissolved. The Privacy Act requires each agency that maintains a system of records to "publish in the Federal Register upon establishment or revision a notice of the existence and character of the system of records . . . ." 5 U.S.C. § 552a(e)(4). Hence, the requirement to publish a system notice applies to systems containing courts-martial records.

33. A ROUTINE USE IS NOT REQUIRED FOR DISCLOSURE OF DEPARTMENT OF DEFENSE RECORDS TO THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION AND TO THE GENERAL SERVICES ADMINISTRATION

The Federal Records Act of 1950, as amended by the National Archives and Records Administration Act of 1984, Pub. L. 98-497, implemented by 36 C.F.R. Ch. XII and 41 C.F.R. Ch. 201, does not require a routine use notice for disclosure from Department of Defense (DoD) records systems. Such disclosures fall into three categories.

a. Records warranting permanent preservation for their historical or other value may be disclosed to the Archivist of the United States, or his representative, under the Privacy Act. See 5 U.S.C. § 552a(b)(6). Ownership of such records also may be transferred to the National Archives and Records Administration (NARA).

b. Records may be transferred to the various Federal Records Centers operated by NARA for temporary storage under the Privacy Act since such records continue to be maintained by the agency. See 5 U.S.C. § 552a(b)(1).

c. Records may be disclosed to the Archivist of the United States or the Administrator, General Services Administration, or their designees, to carry out records management inspections required by law. Such disclosures are authorized by the National Archives and Records Act of 1984. See 44 U.S.C. § 2904 and § 2906, as amended.

34. DEFINITION OF "ORDER OF A COURT OF COMPETENT JURISDICTION"

A subpoena signed by a clerk of a Federal or State court, without specific approval of the court itself, does not comprise an "order of a court of competent jurisdiction" for purposes of nonconsensual disclosures under the Privacy Act, 5 U.S.C. § 552a(b)(11). The overall scheme of the Privacy Act's nonconsensual disclosure provisions in subsection (b) is to balance the need for disclosure against the potential harm to the subject of the disclosure. Even though a subpoena signed by a clerk of the court is issued in the name of the court and carries with it the threat of contempt to those who ignore it, there is no guarantee that it is based upon a careful consideration of the competing interests of the litigant and the individual who is the subject of the record. It is common practice for a subpoena to be issued in blank by a court clerk to a party requesting it, who then fills in the blanks as he or she chooses.

To allow nonconsensual disclosure pursuant to a subpoena--grand jury or otherwise--would permit disclosure of protected records at the whim of any litigant, whether prosecutor, criminal defendant, or civil litigant. Therefore, disclosure of records under subsection (b)(11) requires that the court specifically order disclosure. If there is a threat of punishment for contempt for ignoring a subpoena not approved by the court, the subpoena should be challenged by a motion to quash or modify.

35. RECORDS MAY BE DISCLOSED TO SERVICE-ORIENTED SOCIAL WELFARE ORGANIZATIONS PURSUANT TO AN ESTABLISHED ROUTINE USE

Disclosure of personal information from records systems to service-oriented social welfare organizations, such as Army Emergency Relief, Navy Relief, Air Force Aid Society, American Red Cross, United Services Organization, etc., is permitted pursuant to properly established routine uses. See 5 U.S.C. § 552a(a)(7), (b)(3), and (e)(4)(D). However, only such information as is necessary for the welfare agency to perform its authorized functions should be provided. Information can be disclosed only if the agency which receives it adequately prevents its

disclosure to persons other than their employees who need such information to perform their authorized duties.

36. PRIVACY ACT WARNING LABELS

Using warning labels indicating that particular records are subject to the Privacy Act and require protection from unauthorized disclosure should be left to the discretion of each Department of Defense (DoD) component. In accordance with 5 U.S.C. § 552a(e)(10), agencies are required to establish appropriate safeguards for records and warning labels likely would be appropriate in many cases. However, no standard warning label produced within or outside the DoD appears to be entirely satisfactory for all DoD components in all cases. Therefore, each component in its discretion may adopt existing labels or design its own labels and prescribe their internal use.

37. DISCLOSURE OF RECORDS CONCERNING CHARITABLE CONTRIBUTIONS OR PARTICIPATION IN SAVINGS BOND PROGRAMS

Disclosure of information contained in systems of records concerning employees' or service members' participation in charitable or savings bond campaigns may be necessary to those officers and employees of the Department of Defense components maintaining the systems of records who have a need for the information in the performance of their duties. 5 U.S.C. § 552a(b)(1). Disclosure under subsection (b)(1) is based on a "need-to-know" concept; consequently, disclosure would be authorized to those personnel requiring the information to discharge their duties, such as payroll and allotment clerks, key persons, and campaign aides who assist directly in implementation of the campaign. Disclosure to supervisors is neither related directly to any campaign requirement nor consistent with disclosure provisions of the Privacy Act. Disclosure should be restricted to personnel with a direct functional relationship to a campaign and for campaign purposes only. Personnel authorized to receive this information should be briefed on their responsibilities under the Privacy Act and warned against unauthorized disclosure.

38. PERSONAL NOTES AS RECORDS WITHIN A SYSTEM OF RECORDS

Personal notes of unit leaders or office supervisors concerning subordinates ordinarily are not records within a system of records governed by the Privacy Act. The Act defines "system of records" as "a group of any records under the control of any agency . . . from which information is retrieved by the . . . [individual's] identifying particular . . . ." 5 U.S.C. § 552a(a)(5). One reason for limiting the definition to records "under the control of any agency" was to distinguish agency records from personal notes maintained by employees and officials of the agency. Personal notes that are merely an extension of the author's memory, if maintained properly, will not come under the provisions of the Privacy Act or the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

To avoid being considered agency records, personal notes must meet certain requirements. Keeping or destroying the notes must be at the sole discretion of the author. Any requirement by superior authority, whether by oral or written directive, regulation or command policy, likely

would cause the notes to become official agency records. Such notes must be restricted to the author's personal use as memory aids. Passing them to a successor or showing them to other agency personnel would cause them to become agency records. Chapman v. National Aeronautics and Space Administration, 682 F.2d 526 (5th Cir. 1982).

Even if personal notes do become agency records, they will not be within a system of records and subject to the Privacy Act unless they are retrieved by the individual's name or other identifying particular. Thus if they are filed only under the matter in which the subordinate acted or in a chronological record of office activities, the Privacy Act would not apply to them. However, they likely would be subject to disclosure to a person requesting them under the FOIA. Individuals who maintain personal notes about agency personnel should ensure their notes do not become records within systems of records. Maintaining a system of records without complying with the Privacy Act system notice requirement could subject the individual to criminal charges and a $5,000 fine. 5 U.S.C. § 552a(i)(2).

39. REQUIREMENT FOR PRIVACY ACT ADVISORY STATEMENTS FOR ADMINISTRATIVE PROCEEDINGS

Individuals from whom information about them is solicited during administrative proceedings must be provided Privacy Act advisory statements if records of the proceedings will be retrieved by their personal identifiers. 5 U.S.C. § 552a(e)(3).

40. ACCESS TO MEDICAL RECORDS BY INDIVIDUALS WHO COULD BE ADVERSELY AFFECTED

An individual must be given access to his or her medical and psychological records unless a judgment is made that access to such records could have an adverse effect on the mental or physical health of the individual. That determination normally should be made in consultation with a medical doctor. When it is determined that disclosure of medical information could have an adverse effect upon the individual to whom it pertains, the information should be transmitted to a physician named by the individual and not directly to the individual. However, the physician should not be required to request the record on behalf of the individual. Information which may be harmful to the record subject should not be released to a designated individual unless the designee is qualified to make psychiatric or medical determinations. If the record subject refuses to provide a qualified designee, the request for the medical records should not be honored.

41. NO REQUIREMENT TO PROVIDE PRIVACY ACT ADVISORY STATEMENTS TO LABOR ORGANIZATIONS

A labor organization may furnish information obtained from its members to a Department of Defense (DoD) component to facilitate allotment of union dues, even though the employee-union member is not given a Privacy Act advisory statement before providing the information to the labor organization.

The Privacy Act, 5 U.S.C. § 552a, does not apply to labor organizations; hence, they are not obligated to meet the subsection (e)(3) requirement to provide Privacy Act advice to federal employees before obtaining information for a voluntary allotment of union dues. Any use of the Privacy Act advisory statement by a labor organization is voluntary and may result from express agreement with a DoD component or as a spontaneous union practice. The Standard Form 1187 used to authorize allotments from pay is required by the employee's finance office and information provided on the form will become part of a system of records from which information is retrieved using personal identifiers. If the employee furnishes the completed form to the DoD component, a Privacy Act advisory statement must be provided to the employee by the component. If the labor organization furnishes the completed form to the DoD component, no Privacy Act advisory statement is required unless the component and the labor organization have agreed otherwise.

42. INFORMATION ON FORMS ATTACHED TO SECURITY CONTAINERS OR FACILITIES IS SUBJECT TO THE PRIVACY ACT

Information consisting of names, home addresses and telephone numbers of persons designated as custodians of security storage containers or facilities, when contained in a system of records, is protected by the Privacy Act. Solicitation of such information is necessary to accomplish official Department of Defense (DoD) duties relating to protection of information stored in the containers or facilities, but it requires providing a Privacy Act advisory statement to individuals from whom and when the information is solicited. 5 U.S.C. § 552a(e)(3). This information, when appended to the exterior of a storage facility or container, is observable by any passer-by who may not be an officer or employee officially concerned with the activity. 5 U.S.C. § 552a(b)(1). Therefore, it is a disclosure subject to disclosure accounting requirements of the Act. 5 U.S.C. § 552a(c)(1). Such an accounting, however, would be impossible because of the difficulty of identifying all viewers.

The General Services Administration (GSA) has recognized that this information is subject to the Privacy Act and has revised Optional Form 63 to include a Privacy Act advisory statement and to instruct that the form be attached to the interiors of safes. When such a tag is placed inside a safe, the disclosure is limited to those officers and employees who have a need-to-know and a disclosure accounting is not required. 5 U.S.C. § 552a(b)(1)and (c)(1).

Alternatives to the disclosure accounting requirements when the information is to be displayed outside the security container or facility are:

a. Request the individual's prior written consent for a single particular transaction; i.e., consent to disclosure of name, home address and telephone number for a particular safe, or

b. Require notification of appropriate duty personnel with access to a control roster containing the custodians' information so they may be contacted in the case of a security problem.

43. VERIFYING THE ACCURACY OF PERSONAL DATA IN A RECORD IS SUBJECT TO THE PRIVACY ACT

Requesting an individual to verify or certify the accuracy of information about him or her in a record or on a form constitutes collection of information about the individual and is subject to advice requirements of the Privacy Act, 5 U.S.C. § 552a(e)(3). Guidance on implementation of this subsection issued by the Office of Management and Budget supports this conclusion. Subsection (e)(3) is intended "to assure that individuals from whom information about themselves is collected are informed of the reasons for requesting the information, how it may be used, and what the consequences are, if any, of not providing the information." 40 Fed. Reg. 28961 (July 9, 1975).

Either of the following situations would invoke provisions of the Privacy Act:

a. Verifying a record requires the individual to examine and disclose whether the record is correct; thus, a request for verification is a request for the individual to republish as truthful the information about him or her; or

b. The individual is asked to identify any erroneous entries and furnish the correct data. When the request is soliciting corrections or additions to a record, it is soliciting information about the individual for a system of records.

44. ONE DEPARTMENT OF DEFENSE COMPONENT MAY DISCLOSE HEALTH CARE RECORDS TO ANOTHER WITHOUT A ROUTINE USE OR CONSENT

A record may be disclosed, without the record subject's consent and without a disclosure accounting, to those officers and employees of an agency who need the records in the performance of their official duties. 5 U.S.C.§ 552a(b)(1). Since the Department of Defense (DoD) is considered a single agency within the meaning of subsection (b)(1), one component's health care records may be disclosed to another in connection with valid medical research programs under the authority of this subsection.

45. DISCLOSURE OF THE ORIGINAL, PRE-1968, SERIAL NUMBER (SERVICE NUMBER) ASSIGNED TO MILITARY PERSONNEL

The original serial number, later called the service number, which military services assigned to military personnel until 1968 when it was replaced by the Social Security number (SSN), does not constitute information which cannot be disclosed to third parties. The old serial/service number did not have the same significance or importance as the SSN. The serial/service number, in and of itself, is no longer a personal identifier. Unlike the SSN, it cannot be used to facilitate linkage, consolidation, or exchange of information about an individual through multiple data banks, even within the Department of Defense (DoD). Therefore, disclosure may be made of orders and similar documents which comprise listings of names and serial/service numbers without expunging such numbers, with no invasion of personal privacy. The old serial/service number should not be confused with the SSN which can unlock innumerable data bases and provide access to much information about the individual, both inside and outside DoD.

46. THE SOCIAL SECURITY NUMBER ON BUILDING AND INSTALLATION BADGES

A Social Security number (SSN) on a building or identification badge required to be prominently displayed or worn at all times by an individual constitutes information about the individual under the Privacy Act. The SSN, with an individual's name, is a record. 5 U.S.C. § 552a(a)(4). This information, when displayed on an exposed identification badge, is observable by any passer-by who may not be an officer or employee officially concerned with the intended use of the badge. It amounts to a constant verification by the individual that information about him or her being displayed is true. Therefore, unless the SSN on a building pass or identification badge is essential, it should not be included when such passes or badges are issued, reissued, or replaced.

47. USING BOTH GENERAL AND SPECIFIC PRIVACY ACT EXEMPTIONS FOR THE SAME SYSTEM OF RECORDS

The general exemption, 5 U.S.C. § 552a(j)(2), and the specific exemption, 5 U.S.C. § 552a(k)(2), ordinarily cannot be used for the same system of records. For example, subsection (j)(2) applies to law enforcement records of criminal law enforcement activities, whereas subsection (k)(2) applies to law enforcement records other than those covered by subsection (j)(2). Nonetheless, a single system of records maintained by a law enforcement activity may contain both criminal law enforcement records exempted under (j)(2) and personnel security records exempted under (k)(5). If the two types of records are clearly segregable within the single system of records, both exemptions would apply. Also, a system of records may qualify for exemption under more than one specific exemption under subsection (k). For any system of records, only exemptions established in accordance with DoD 5400.11-R may be claimed.

48. DISCLOSURE OF INFORMATION IN BLANKET ORDERS

Prior to implementation of the Privacy Act on September 27, 1975, some components issued single blanket orders or other official documents concerning such personnel actions as promotions, discharges, temporary duty orders, permanent change of station orders, etc. Those documents contained limited amounts of information about each of the individuals named in them, such as Social Security numbers, homes of record, home addresses, etc. Nevertheless, disclosure of the documents to the individuals named in them is not prohibited by the Privacy Act as long as:

a. The documents are filed in their official personnel records;

b. The documents previously were furnished to the named individuals; and

c. The documents were created prior to September 27, 1975.

Nothing in this advisory opinion should be construed as limiting access by an individual to third party information required to be disclosed under the Freedom of Information Act, 5 U.S.C. § 552. See 5 U.S.C. § 552a(b)(2).

THIS PAGE LEFT BLANK INTENTIONALLY

APPENDIX B

Selected Internet Websites for Government Information Lawyers
(available as of 31 March 2000)

1. The Freedom of Information Act Guide & Privacy Act Overview, September, 1997 Edition. http://www.usdoj.gov.

2. Federal Regulations. http://www.access.gpo.gov/

3. DOD Directive 5400.7-R, Department of Defense Freedom of Information Act Program (September 1998), and other DOD Directives and Instructions.

   a. http://www.dtic.mil/

   b. http://www.defenselink.mil/pubs

4. Army regulations.

   a. http://www.usapa.army.mil/http://www.dtic.mil

   b. http://www.rmd.belvoir.army.mil/FOIAMain.htm

5. Air Force regulations.

   a. http://afpubs.hq.af.mil/

   b. http://www.foia.af.mil/

6. Naval Services regulations.

   a. http://neds.nebt.daps.mil/

   b. http://www.hqmc.usmc.mil/foia.nsf (Marine Corps)